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No. _____

In The

Supreme Court Of The United States

October Term, 1990

FREDERICK A. SIEGERT,

Petitioner

v.

H. MELVYN GILLEY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

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July 13, 1990

Questions Presented

1. In a claim for damages under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), in which malice has been alleged and where qualified immunity has been raised as a defense, whether a "heightened pleading" standard which precludes limited discovery prior to disposition on a summary judgment motion violates applicable law?

2. In a *Bivens* claim for damages, whether a federal official can be qualifiedly immune from suit without regard to whether the challenged conduct was discretionary in nature?

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Petitioner, Frederick A. Siegert, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals entered in the above-entitled proceeding on February 9, 1990.

OPINIONS BELOW

The April 16, 1990 Order of the United States Court of Appeals for the District of Columbia Circuit, denying *en banc* review, with a concurring opinion (Wald, C.J.), and that court's April 16, 1990 Order denying rehearing, with a dissenting statement (Wald, C.J.), are unreported and are reprinted in the appendix hereto at, respectively, 2a, 3a and 4a. The February 9, 1990 Opinion and

Order of the court below, reversing the trial court's denial of respondent's summary judgment motion, is reported at 895 F.2d 797 (D.C. Cir. 1990), and is reprinted in the appendix hereto at 5a-25a. That court's January 9, 1990 judgment denying petitioner's motion to dismiss the appeal is unreported and is reprinted in the appendix hereto at 26a. The June 30, 1990 opinion and order of the trial court denying respondent's motion for reconsideration of the denial of his motion to dismiss or in the alternative for summary judgment is reported at 692 F. Supp. 1408 (D.D.C. 1988) and is reprinted in the appendix hereto at 27a-52a. The trial court's December 3, 1987 opinion and order denying respondent's motion to dismiss or in the alternative for summary judgment is unreported and is reprinted in the appendix hereto at 53a-54a.

JURISDICTION

In response to petitioner's complaint for damages and injunctive relief, respondent filed a motion to dismiss or in the alternative for summary judgment in which the defense of qualified immunity was raised. On December 3, 1987 the United States District Court (Sporkin, J.) conditionally denied the motion pending limited discovery. 53a-54a. Respondent sought reconsideration of that decision and on June 30, 1988, the trial court denied the motion and ordered that the limited discovery it had previously ordered be conducted. 27a-52a. On January 9, 1989 the United States Court of Appeals for the District of Columbia Circuit denied petitioner's motion to dismiss respondent's appeal, 26a, and on February 9, 1990 that court reversed the trial court's denial of respondent's motion to reconsider, vacated its discovery order and remanded the case with instructions that it be dismissed. 5a-25a. A final order denying a petition for rehearing or suggestion for rehearing *en banc* was entered on April 16, 1990. 2a-4a.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the District of Columbia Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOKED

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. §331. Judicial Conference of the United States:

> The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate. He shall preside at such conference which shall be known as the Judicial Conference of the United States. Special sessions of the Conference may be called by the Chief Justice at such times and places as he may designate.
>
> The district judge to be summoned from each judicial circuit shall be chosen by the circuit and district judges of the circuit at the annual judicial conference of the circuit held pursuant to section 333 of this title and shall serve as a member of the conference for three successive years, except that in the year following the enactment of this amended section the judges in the first, fourth, seventh, and tenth circuits shall choose a district judge to serve for one year, the judges in the second, fifth, and eighth circuits shall choose a district

judge to serve for two years and the judges in the third, sixth, ninth, and District of Columbia circuits shall choose a district judge to serve for three years.

If the chief judge of any circuit, the chief judge of the Court of International Trade, or the district judge chosen by the judges of the circuit is unable to attend, the Chief Justice may summon any other circuit or district judge from such circuit or any other judge of the Court of International Trade, as the case may be. Every judge summoned shall attend and, unless excused by the Chief Justice shall remain throughout the sessions of the conference and advise as to the needs of his circuit or court and as to any matters in respect of which the administration of justice in the courts of the United States may be improved.

The Conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary. It shall also submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business. The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee. The Conference or the standing committee may hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and make necessary and appropriate orders in the exercise of its authority. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the Supreme Court or by the clerk of any court of appeals, at the direction of the Chief Justice or his designee and under the seal of the court and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and

subpoenas duces tecum issued on behalf of the United States or an officer or any agency thereof. The Conference may also prescribe and modify rules for the exercise of the authority provided in section 372(c) of this title. All judicial officers and employees of the United States shall promptly carry into effect all orders of the Judicial Conference or the standing committee established pursuant to this section.

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

The Judicial Conference shall review rules prescribed under section 2071 of this title by the courts, other than the Supreme Court and the district courts, for consistency with Federal law. The Judicial Conference may modify or abrogate any such rule so reviewed found inconsistent in the course of such a review.

The Attorney General shall, upon request of the Chief Justice, report to such Conference on matters relating to the business of the several courts of the United States, with particular reference to cases to which the United States is a party.

The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

Rule 8, Federal Rules of Civil Procedure. General Rules of Pleading:

(a) Claims For Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and

satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure To Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of the consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Rule 9, Federal Rules of Civil Procedure. Pleading Special Matters:

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act: In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasijudicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C. §1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

STATEMENT OF THE CASE

Petitioner, an experienced clinical psychologist,[1] began his employment at St. Elizabeths Hospital ("St. E's") in Washington, D.C. in November 1979 where he worked with severely retarded children, to a more limited degree with severely retarded adults, and with members of their families. During most of his employment there he was the Behavior Therapy Coordinator for the division of the hospital in which he worked, and for all of his employment there he had received exemplary "job performance"

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[1] Prior to his employment at St. Elizabeths, petitioner, who has a Ph.D in clinical psychology, had worked for several years at the District of Columbia's Forest Haven School for the Mentally Retarded and at other similar public institutions.

ratings. For example, from January 1984 through December 1984 his "job performance" rating was "outstanding."

Respondent, a clinical psychologist who lacked any significant practical experience and theoretical training in behavior modification therapy for the mentally retarded, became the division's supervisory psychologist in January 1985. His immediate attempts to change some aspects of the behavior modification program that had been used for many years by petitioner and other professionals in the division were strongly resisted since the proposed changes were inappropriate for and would be ineffective in the treatment of these profoundly retarded individuals. The tension and animosity between petitioner and respondent was exacerbated by petitioner's absence from work for a considerable period in 1985 due to a head injury he had sustained as a result of working with a patient earlier in that year. Respondent thought petitioner was "AWOL."[2]

In the Spring of 1985 petitioner began to look for a new job, in large part due to respondent's attitude and actions which were interfering with petitioner's ability to work effectively with his patients. In May 1985 the Department of the Army informed petitioner that he would be considered for vacancies in European posts as a clinical psychologist, and in August 1985 petitioner signed a 36-month contract with the Army to work in their Exceptional Family Member Program in Bremerhaven, West Germany.

In late August or early September 1985, and notwithstanding his exemplary "job performance" ratings, petitioner was notified that a "letter of removal" would not be placed in his personnel file on condition that he resign his position forthwith. It was petitioner's belief that the proposed removal grew directly out of his conflict with respondent and with the related, and as of then, still mixed-up medical leave/AWOL situation. Petitioner informed St. E's that he would be resigning in any event since he had signed or was about to sign a contract with the Army, and on October 1,

[2] Although St. E's records initially noted that petitioner was "absent without leave" during that period, the Workman's Compensation Board of the Department of Labor has fully compensated petitioner for what actually was compensable medical leave time.

1985 petitioner resigned from St. E's. He began his employment with the Army in Bremerhaven shortly thereafter.

Becoming "credentialed"[3] both as to his working with children and, separately, as to his working with adults was a condition of employment with the Army, as it had been when petitioner worked at St. E's. Consequently, and shortly after his arrival in Bremerhaven, petitioner filled out and signed an Army-regulation "Credential Information Request Form." 55a. Among other things, it contained a form letter which asked for "all information on job performance and the privileges granted while I was a member of your staff...." *Id.* On or about October 15, 1985, the Credential Information Request Form was sent to St. E's where it was apparently channeled to Eugene C. Stammeyer, Director of Psychology there, who, in turn, and unbeknownst to petitioner, forwarded the Army's standardized form to petitioner's last supervisor at St. E's, that is, to respondent. Rather than giving the Army any of the standardized data it had requested, however, all of which was in petitioner's personnel file there, respondent spontaneously wrote a letter to Lt. Col. William R. Smith, Jr., Deputy Commander for Clinical Services at Bremerhaven, chairperson of the credentials committee and petitioner's immediate supervisor.[4] In that unsolicited October 23, 1985 letter, respondent maliciously and falsely stated that petitioner was "inept, unethical [and] perhaps the least trustworthy individual [he had] supervised in...thirteen years at" St. E's. 35a.

As a direct result of respondent's letter, Col. Smith notified petitioner that reports about him were "extremely unfavorable." Therefore, petitioner was informed, the hospital's credentialing committee would not recommend the granting of privileges needed in order for him to work at the hospital. *Id.*

[3] "Credentialing" is synonymous with "privileges" which are granted by a hospital's own medical staff or board. For example, if a person wants to practice a particular specialty in a hospital, he or she must be granted particular privileges in conformity with that specialty's standards or criteria for practice which have been established by the hospital's board, such as educational standards, years of practice, type and quality of supervision, and so on. 34a.

[4] The trial court stated that Col. Smith "contacted" and "spoke with" respondent prior to October 23, 1985. 34a. Petitioner alleged no such thing and knows of nothing in the public record which reflects that that occurred.

For the following several months, while petitioner was appealing the provisional denial of becoming credentialed, he was alternately allowed to practice his specialty for a time and then, alternately, he was not, and for many months during the credential review process, petitioner was relegated to working in the medical library at the Bremerhaven hospital. 8a.

In July 1986, in an effort to practice his specialty while he was trying to gain his credentials, petitioner applied for and was hired as a clinical psychologist at the Army's hospital in Stuttgart. On the day he reported for work, however, he was turned away because of the negative things personnel there had heard about him from the Army hospital in Bremerhaven. 8a; 35a. Petitioner returned to Bremerhaven and ultimately failed in his efforts to obtain his credentials. As a result, he resigned his position since, without the credentials, he was unable to practice as a clinical psychologist in the area of his specialty or in any other comparable area. *Id.*

On November 25, 1986 petitioner filed a complaint against respondent for damages[5] in the United States District Court for the District of Columbia. He alleged that by maliciously writing the October 23, 1985 letter, respondent had violated petitioner's rights guaranteed by the due process clause of the Fifth Amendment as interpreted under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) in that respondent's act severely and irreparably damaged both petitioner's reputation and his ability to earn a living as a governmental clinical psychologist.[6]

On February 5, 1987 respondent filed a motion to dismiss the complaint, or alternatively for summary judgment. Citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and among other things, he claimed he was qualifiedly immune from suit since his conduct did not violate clearly established law of which a reasonable person would have known. Accordingly, he urged dismissal or summary judgment since there was no clearly established constitutional

[5] In an amended complaint petitioner additionally requested injunctive relief.

[6] Petitioner also alleged several pendent claims, including defamation, intentional infliction of emotional distress, interference with contractual relations and interference with prospective advantage.

prohibition against furnishing a "reference" about a former employee for a new employer.[7] The motion was supported not by an affidavit from respondent, who theoretically could have stated that the letter was written in good faith, but rather by one from Dr. Stammeyer who mischaracterized the Army's Credential Information Request Form as a "request for a reference."[8]

On December 3, 1987, the trial court stated that it was not "prepared to decide this matter on a Summary Judgment motion at this time," 54a, that it needed to "see a more developed record," *id.*, and "limited discovery" was therefore ordered. *Id.*[9]

On December 15, 1987 respondent filed a motion seeking reconsideration of the court's December 3, 1987 decision together with a request that discovery be stayed pending resolution of that motion. He argued that under *Harlow*, *supra*, and *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the court was compelled to resolve the summary judgment motion prior to ordering discovery. Respondent claimed that there were no material facts in dispute,[10] and that since petitioner had not conformed his opposition to Rule 56(f), F. R. Civ. Proc., respondent's motion could be resolved without discovery because it had raised only legal issues.[11]

[7] As further grounds for dismissal, respondent argued that a state's common law, and not the due process clause, protected reputation and the right to exploit it for commercial gain, that the letter was not published incident to petitioner's removal from his job, and that, in any event, petitioner consented to the letter of "reference" which was sent by respondent to Lt. Col. Smith.

[8] In opposition to the motion, petitioner argued that responding to a Credential Information Request Form was not a discretionary act but rather was a "ministerial" task, that is, an act which required the "execution of a policy as distinct from its formulation." *Briscoe v. Arlington County*, 738 F.2d 1352 (D.C.Cir. 1984). See also, *Harlow*, *supra*, at 816.

[9] The court found it appropriate for the parties to take each other's depositions, for the deposition of Col. Smith to be taken, and for correspondence between Col. Smith and respondent to be produced. 54a.

[10] Contrary to respondent's claim, in a statement of material facts in issue filed under a local court rule, and in addition to other disputed facts, petitioner stated that respondent had performed a ministerial, that is, a "non-policy-making," task.

[11] Petitioner opposed the motion on grounds that prior to ruling on the summary judgment motion, the court ought to be able to first determine whether there

On June 30, 1988 the trial court denied respondent's request for reconsideration. 27a-52a. Among other things, the court observed that respondent had refused to accept as true petitioner's allegations, 32a, and had "sharply slanted" the characterization of what had been requested by the Army. *Id.* Moreover, and as to whether respondent had violated a clearly established right, the trial court suggested that respondent's actions may have constituted the utterance of a false statement under 18 U.S.C. §1001. 48a. In any event, and in light of the lack of assertions to contradict petitioner's allegations,[12] it appears that the only material facts which the court considered to be in dispute were the "truth or falsity of [respondent's] letter," 34a-35a, and what the content was of discussions the court believed[13] took place between Lt. Col. Smith and respondent. 34a.

With its factual analysis complete, with at least a suggestion that respondent had engaged in a ministerial or a discretionary act, see, *supra*, and under *Harlow* and its progeny,[14] the trial court determined that the threshold question that had to be addressed was whether it was clearly established in late 1985 that petitioner's loss of employment at Bremerhaven and his inability to obtain his credentials as a result of respondent's communications involved the "violation of a concrete, specific 'liberty interest' within the protection of the due process clause of the Fifth Amendment." 39a. The court found both that it was, 39a-46a, and that a reasonable person would have known that it was in late 1985. 46a; 49a. Moreover, the court found that petitioner's allegations, which had been subjected to the "heightened pleading" standard of the circuit,[15] were "well pleaded...[and] were accepted as true." 52a. The court therefore denied respondent's motion and ordered the previously-ordered discovery to proceed. *Id.*

were any material facts in dispute, such as whether the Credential Information Request Form was a request for a letter of reference or simply a request for an objective response as to what petitioner's credentials and job performance ratings had been. In denying the motion, the trial court resolved this question by accepting petitioner's construction of what the Form meant.

[12] The court determined that Dr. Stammeyer's affidavit was largely devoted to an explanation of the process whereby St. E's was asked to respond to the standardized credentialing form.

[13] See, *supra*, at n. 4.

[14] See, e.g., *Anderson v. Creighton*, 483 U.S. 635 (1987); *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

On February 9, 1990 the decision of the trial court was reversed.[16] 5a-25a. In *dicta*, the court below found that the objective, reasonable person standard under *Harlow* had "purged qualified immunity of its subjective components,"[17] and had "rejected inquiry into state of mind...."[18] 12a. Nevertheless, finding that neither *Harlow*, *Mitchell* nor *Davis* made it clear that inquiry into subjective motivation was actually precluded under qualified immunity analysis, the court below determined that petitioner had to be given "the opportunity to prove such allegations of unconstitutional motive." *Id.*[19] Thus, while in one breath giving this opportunity to petitioner, in the next it took it away by concluding that in claims where unconstitutional motive is advanced, "if a plaintiff fails to allege direct evidence of unconstitutional intent, his claim must be dismissed immediately," without the opportunity to conduct any discovery such as that which had been ordered by the trial court. 12a.

In its analysis under *Harlow* and pursuant to the circuit's heightened pleading standard, the court first determined that the trial court failed to adequately particularize the right at issue. 16a. Contrary to law, 32a, the court below adopted respondent's view that the Army had requested him to respond to a broad-ranging "report" or

[15] See, e.g., *Hobson v. Wilson*, 737 F.2d 1 (D.C.Cir. 1984); *Smith v. Nixon*, 807 F.2d 197 (D.C. Cir. 1986).

[16] On January 9, 1989 the court below denied petitioner's motion to dismiss the appeal. 26a.

[17] *Mitchell v. Forsyth*, *supra*, at 517.

[18] *Davis v. Scherer*, 468 U.S. 183, 191 (1984).

[19] The court below failed to make the threshold determination, under *Westfall v. Erwin*, ___U.S.___, 98 L.Ed.2d 619 (1988), decided a year prior to consideration of this case, as to whether what respondent was requested to do was a discretionary or a ministerial task if, indeed, he was requested to do anything at all. The court conceded that there was "some dispute as to whether the evaluation sought here was 'subjective' or 'objective,'" 16a, but it decided that this inquiry was irrelevant, *id.*, under the *Harlow* standard. See, *infra*.

"evaluation" about an employee, 16a, unlike the voluntarily written defamatory letters at issue in *Doe*[20] and *Bartel*.[21] Thus, the court reasoned, under the circumstances of this case, the law was not clearly established, within the meaning of *Harlow*, that respondent had violated petitioner's due process rights.

Notwithstanding that view, the court "assumed without deciding," 16a- 17a, that petitioner's *Bivens* claim could survive respondent's motion if his pleadings comported with the circuit's heightened pleading requirement as to unconstitutional motive. *Id.* According to the court, however, petitioner's allegation of malice was "unsupported by any evidence beyond innuendo." 17a. Limited discovery that might be permitted under *Anderson*, and that had been permitted in *Martin v. D.C. Metro. Police Dept.*, 812 F.2d 1425 (D.C.Cir. 1987), was inappropriate here. In the court's view, *Anderson* permitted discovery only to "establish the factual basis for determining the objective reasonableness of... [a defendant's] acts." 18a. In contrast, the court found that the district court's limited discovery order was for the impermissible purpose of inquiring into motive. *Id.* And as to *Martin*, the court claimed that it had allowed limited discovery after remand there "only as a 'one-time exception' because of the special exigencies in that case." *Id.* Accordingly, the court reversed the trial court's denial of respondent's motion for reconsideration, vacated its discovery order and remanded the case with the directive that the case be dismissed. 19a.

As to the majority's endorsement of the "heightened pleading" rule, the dissent (Wald, C.J.), 19a-25a, zeroed in on the:

> "dilemma created by our circuit's current jurisprudence on qualified immunity: plaintiffs are required to adhere to a 'heightened pleading standard' of nonconclusory facts that demonstrate a government official's unconstitutional motive, but they are entirely restricted from obtaining through discovery the information necessary to make that showing."

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[20] *Doe v. United States Dept. of Justice*, 753 F.2d 1092 (D.C.Cir. 1985).

[21] *Bartel v. F.A.A.*, 725 F.2d 1403 (D.C.Cir. 1984).

19a. The standard, it was stated, reflected a "misguided approach to our 'twin goals' of 'limit[ing] the litigation burdens placed on government officials by insubstantial lawsuits' and 'preserving the opportunity for plaintiffs to vindicate constitutional rights.'" 20a. The dissent went on to state that instead of "slam[ming] shut this window for discovery through...[an] unyielding application of the heightened pleading standard," 24a, that is, when "proof of the defendant's motive is peculiarly in the defendant's hands," 20a, limited discovery ought to be permitted in order to "preserve a plaintiff's constitutional rights," 21a, while simultaneously "enabling Government officials to avoid the rigors of 'protracted' discovery." *Id.*

Under the circumstances of this case, the dissent found that although the trial court correctly determined that it was clearly established in late 1985 that petitioner had a right to a "good faith evaluation," 24a, the lower court failed to determine whether petitioner's allegations of malice had met the heightened pleading standard. *Id.* Accordingly, vacation of the denial of the qualified immunity defense was mandated. *Id.* Importantly, however, it was also found that petitioner's pleadings contained "some evidentiary basis," *id*, to support his allegations of malice, and that limited discovery was therefore warranted in order to fairly resolve the qualified immunity issue. *Id.*

On April 16, 1990 petitioner's petition for rehearing and suggestion for rehearing *en banc* were denied. 2a-4a. Chief Judge Wald would have granted rehearing. 4a. She agreed, however, that at that time, rehearing the case *en banc* "would not alleviate the problem" created by the circuit's "heightened pleading standard," even though the issue, "which raise[d] serious questions of fairness and justification under existing Supreme Court precedent," was one of "exceptional importance" within the meaning of Rule 35(a), Fed. R. App. Proc. 3a.

REASONS FOR GRANTING THE WRIT

I. The Court Below Has Decided An Important Question Of Federal Law Which Has Not Been But Should Be Settled By This Court, Which Conflicts With Applicable Decisions Of This Court, And Which Conflicts With Certain Federal Rules Of Civil Procedure.

A. This Court Has Not Ruled On The Lower Court's "Heightened Pleading" Standard Which Conflicts With *Harlow*, *Mitchell* and *Anderson*.

In recent[22] *Bivens* claims in which malice has been alleged, the court below has required plaintiffs to advance, in most cases prior to discovery,[23] "specific, discernible facts or offers of proof that would constitute direct as opposed to merely circumstantial evidence of the [unconstitutional] intent." 14a. Failure to allege that evidence has resulted in immediate dismissal of those claims. 13a. The justification for this "heightened-pleading-with-no-discovery" standard, on which this Court has not yet ruled, rests on serious misreadings of the law by the court below.

The court first ruled that the right respondent was alleged to have violated was not clearly established in October 1985. 14a-16a.[24]

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[22] See, e.g., *Hobson v. Wilson*, 737 F.2d 1 (D.C.Cir.1984); *Martin v. Malhoyt*, 830 F.2d 237 (D.C.Cir.1987); *Smith v. Nixon*, 807 F.2d 197 (D.C.Cir.1986); *Ellsberg v. Mitchell*, 807 F.2d 204 (D.C.Cir.1986); *Halperin v. Kissinger*, 807 F.2d 180 (D.C.Cir.1986); *Whitacre v. Davey*, 890 F.2d 1168 (D.C.Cir.1989).

[23] In *Martin v. D.C. Metro. Police Dept.*, 812 F.2d 1425 (D.C. Cir. 1987), the court made a "one-time" exception, 18a, in permitting limited discovery because that case was "not ordinary," *Martin*, at 1435, and the "approach to pretrial development of cases such as this one was far from clear and certain when the district court made its rulings...." *Id.*, at 1436. In fact, there was nothing out-of-the-ordinary about *Martin*. It involved a run-of-the-mill civil rights conspiracy claim against the city's and federal police. To permit limited discovery in one case because of the uncertainty of the law as to unconstitutional motive would appear to bring the *Martin* panel's decision into direct conflict with the panel here. The law is obviously far from clear on the issue even now.

[24] In ruling on this case, the court below ignored respondent's failure to allege good faith in his motion for summary judgment. Further, it failed to consider whether respondent's acts were discretionary or ministerial in nature. See *infra*.

The cout's ruling was in error.[25] Nevertheless, the claim was not dismissed. Instead, the court correctly found that petitioner's allegations of malice could keep his case alive. 16a-17a. Relying on *Hobson v. Wilson*, 737 F.2d 1 (D.C.Cir.1984), it explained that the allegation of malice was an "essential element," 12a, of petitioner's constitutional claim. If, the court continued, his assertions on this element could meet the circuit's "heightened pleading" standard, respondent's qualified immunity defense would fail. *Id.* It was determined, however, that petitioner's allegations[26] were nothing more than mere "innuendo," 17a, and that these "conclusory allegations" should not subject government officials to the burdens of even limited discovery.

In ruling as it did, here and in prior cases, the court below has taken *Harlow*'s rule, that "bare allegations of malice should not suffice to subject government officials ...to the burdens of *broad-reaching* discovery," *Harlow*, 457 U.S. at 818, (emphasis added), and given it new meaning: in the court's view, "no broad-reaching" discovery means "no discovery at all."

Protecting federal officials from the burdens of trial, including discovery, "*where possible*,"(emphasis added), *Mitchell v. Forsyth*, 472 U.S. at 526, was an essential concern in formulating qualified immunity law. But where a complaint states a violation of clearly established law,[27] and where an essential element of a

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[25] The court failed to consider that the false job assessment may have been a violation of "statutory...rights," *Harlow* at 818, see, e.g., 18 U.S.C. sec. 1001, as well as of constitutional law. 24a.

[26] In his complaint and affidavit opposing respondent's summary judgment motion, petitioner alleged that respondent "had embarked on a course of making [petitioner's] life at St. [E's] unpleasant because he resented petitioner's lengthy medical leave and [his] resistance to respondent's attempts to alter St. [E's] behavior modification program," 24a, that until respondent became his supervisor, petitioner had a history of excellent "job performance" ratings, 24a-25a, and that the language of the letter respondent wrote was "extreme." 25a. The allegations and inferences to be drawn from them provide at least "some evidentiary basis that [respondent's] motives were malicious and...unconstitutional." 24a.

[27] The trial court and the dissent correctly defined the right that petitioner had alleged in his complaint. The right, to expect good faith communication about employment information, leaving for the moment whether the information was ministerial or discretionary in nature, see, *infra*, was clearly established at the

party's *Bivens* claim includes allegations which at least circumstantially evidence unconstitutional motive, there is and should be nothing in the law which proscribes a trial court from permitting limited discovery "tailored specifically to the question of qualified immunity," *Anderson*, at 3042, n. 6, and, more particularly, to the question of a defendant's malicious and unconstitutional intent.

The court's "heightened-pleading-with-no-discovery" standard ignores that formula and places before defendants in this circuit[28] a hurdle not possible to jump. 19a-25a. The standard cuts across the grain of the spirit of the law from pragmatic and policy perspectives. Accordingly, this important issue, whether in order to "stay in court," 20a, litigants must be required to allege without benefit of any discovery direct evidentiary facts as to unconstitutional motive, should be addressed here.[29]

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time. 24a. The majority, however, held otherwise. In distinguishing *Doe, supra*, and *Bartel, supra*, the court found that the defamatory letter was written in response to a *request* for job information rather than spontaneously, and that, therefore, there was no clearly established right for a former employer to communicate to a prospective employer about an employee. Assuming *arguendo* that a request was made, even for discretionary information, it is important to note that the majority did not even consider that the "unlawfulness [of respondent's bad faith act] was apparent" and "sufficiently clear" in light of pre-existing law. *Anderson*, at 639. See also, e.g., 18 U.S.C. sec. 1001. Accordingly, the court should have found that petitioner had stated a claim of a violation of "sufficiently" established law. *Anderson; Mitchell*, at 526.

[28] While it is not absolutely clear, it appears as though rules that at least the Ninth Circuit has announced permit limited discovery when malice has been alleged. See, e.g., *Gibson v. United States*, 781 F.2d 1334, 1340 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987)("...[w]hile a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled...plaintiff is not expected to plead his evidence or specific factual details not ascertainable in advance of discovery"). See also, *Willson v. Cagle*, 711 F. Supp. 1521 (N.D. Cal. 1988). Other circuits may also agree with this logical position. See *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988); *Sutton v. United States*, 819 F.2d 1289 (5th Cir. 1988); *Dowling v. City of Philadelphia*, 855 F.2d 136 (3rd Cir. 1988).

[29] Put another way, this Court should clarify whether malice can be construed as an "essential element" of a party's *Bivens* claim, and if it can, whether it must be subjected to a "heightened-pleading-with-no-discovery" standard, as suggested by the lower court or, as petitioner argues, may malice be pleaded generally as

B. This Court Has Not Ruled On The Lower Court's "Heightened Pleading" Standard Which Conflicts With Rules 8(a)(2) And 9(b), Federal Rules Of Civil Procedure.

In 1958 Congress created and authorized the Judicial Conference of the United States to "make a continuous study of the rules of practice and procedure...to promote simplicity in procedure, fairness in administration, the just determination of litigation and the elimination of unjustifiable expense and delay...." 28 U.S.C. §331. Pursuant to Congress's directive, committees were appointed by this Court to issue reports and make recommendations for this Court's consideration and adoption, or modification or rejection as to changes in or additions to the federal rules of practice. *Id.* Rules 8(a)(2) and 9(b) of the Federal Rules of Civil Procedure have been studied, occasionally modified and approved over the years, and in combination, they still make it plain that in claims where malice is alleged, this "condition of the mind may be averred generally." Rule 9(b). On its face and as applied, the circuit's "heightened pleading" requirement conflicts with the meaning of the rules head-on.

It is now well-established that the purpose of the federal rules of procedure:

> "...rejects the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome, and the principle is accepted that the purpose of pleading is to facilitate a proper decision on the merits."

Conley v. Gibson, 355 U.S. 41 (1957)(Black, J.). Further, it is long-settled policy that the system which this Court adopted for pleading should be "uniform...for all [types] of cases." *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir.1957)(Clark, C.J.).

That policy's uniform and "simplified," *Conley v. Gibson, supra*, system, embodied in Rule 8(a)(2), was designed to give the opposing party fair notice of the nature and basis or grounds of the

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an essential element of the claim, with an order for immediate discovery tailored specifically to support that facet of the suit prior to final disposition of a summary judgment motion.

claim and a general indication of the type of litigation involved. *Conley v. Gibson*, *supra*. See also, Wright & Miller, *Federal Practice & Procedure*: Civil 2d, §1215. To expect a plaintiff to plead "with particularity," Rule 9(b), as to the malice that was in a defendant's mind is to take the "keystone" *id.*, at §1202, of the system of pleading and turn it on its head. Moreover, that expectation as reflected in the lower court's standard directly clashes with the plain meaning of Rule 9(b).

Unlike allegations of "fraud" and "mistake," which *must* be pleaded "with particularity," Rule 9(b), malice and other states of mind may unquestionably be averred "generally." *Id.* Thus, even in cases where a qualified immunity from suit has been alleged, and notwithstanding the important policies which were considered in formulating qualified immunity rules, malice may nevertheless be generally pleaded. That is precisely what petitioner did, consistent with and in reliance on the letter of the law. His claim should not, accordingly, have been dismissed under the rubric of a standard of pleading so squarely contrary to Judicial and Congressional intent.

II. The Question Of Whether A Federal Official May Be Entitled To Qualified Immunity Without Regard To Whether The Challenged Conduct Was Discretionary In Nature Is An Important Federal Question Which Should Be Settled By This Court.

A. Under *Westfall, et al. v. Erwin et ux.*, 484 U.S. 292, 98 L.Ed 2d 619 (1988) A Federal Official Should Not Be Entitled To Qualified Immunity Without Regard To Whether The Challenged Conduct Was Discretionary In Nature.

In the court below petitioner argued that the request for all information on "job performance" and "credentials" were common bureaucratic "terms of art." He therefore urged that a response to the Credential Information Request Form required not "judgments surrounding discretionary action [which are]...influenced by... experiences, emotions and values," *Harlow*, at 816, but rather a response which was a non-policy-making "function," *Westfall v. Erwin*, ___U.S.___, 98 L.Ed. at 625, n. 3; *Forrester v. White*, ___U.S.___, ___, 108 S.Ct. 538, 544 (1988)("immunity is justified and defined by the *functions* it protects and serves...."), that is, an objective, ministerial act. Respondent, however, did not respond to the standardized Form at all. Instead, he gave the Army a wholly subjective and unsolicited letter of "reference" which is the subject of petitioner's claim.

The court below cursorily addressed this material fact[30] in dispute: "Although there is some dispute as to whether the evaluation sought here was 'subjective' or 'objective,'" the issue itself was irrelevant to a qualified immunity determination. [11 slip] ?a. Under *Westfall v. Erwin*, the court was clearly wrong.

As it was held to be in *Westfall* in the absolute immunity sphere, whether or not an act is discretionary should be a condition precedent to deciding whether an official is entitled to qualified immunity from suit.[31] The "central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from... [constitutional] tort liability without regard to whether the alleged tortious conduct is discretionary in nature." *Westfall*, at 626.

Respondent defined the request that was made by the Army as one for a job "reference." Petitioner, on the other, alleged that what St. E's was asked to do was to objectively respond to a form in a way that did not even "involve some modicum of choice." *Westfall*, at 627.[32] Thus, a fact that was "critical," *Westfall*, at

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[30] In petitioner's statement of material facts at issue which was filed pursuant to a local trial court rule, he stated that "defendant's position at St. Elizabeths was as a low level, *non-policy-making* supervisor." (Emphasis added).

[31] As qualified immunity has tracked absolute immunity as to appeals under the collateral order doctrine, *Mitchell v. Forsyth*; *Martin v. D.C. Metro. Police Dept.*, *supra*, at 1428, n. 10, so, too, should the it track absolute immunity for purposes of this issue.

[32] Petitioner does not suggest that an official should not be subjectively candid in responding to requests for references about former employees. Respondent's response, however, was not an "*appropriate* exercise of [his] function," *Forrester v. White*, ___U.S.___, 108 S.Ct. 538, ___, 542 (1988), (emphasis added) under the circumstances of this case. This is particularly true when considered in the light of petitioner's having informed St. E's, before his resignation,

626; *Doe v. McMillan*, 412 U.S. 306 (1973), to a qualified immunity determination was plainly in dispute, and, as a consequence, respondent's qualified immunity defense should, likewise, have plainly failed. *Westfall*, at 627-628.

As it did in *Westfall* in the context of absolute immunity analysis, and from a "consistency" perspective, whether a qualified immunity defense should succeed without regard to whether the official's act was discretionary needs to be answered by this Court.

Conclusion

For the foregoing reasons, this petition for certiorari should be granted. If petitioner is correct in urging that the United States Court of Appeals for the District of Columbia erred in reversing the decision of the trial court, the matter should be reversed and remanded for appropriate disposition.

Respectfully submitted,

Nina Kraut

3815 Yuma Street, NW
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202/745-0300
Counsel of Record

July 13, 1990

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that he had a contract for a job as a clinical psychologist. Had respondent genuinely been concerned with petitioner's "ineptness," he would have immediately written to the petitioner's new employer, or would have, and should have, contacted the psychology licensing boards, prior to petitioner's resignation.

No. _____

IN THE

Supreme Court Of The United States

October Term, 1990

FREDERICK A. SIEGERT,

Petitioner

v.

H. MELVYN GILLEY,

Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nina Kraut
3815 Yuma Street, NW
Washington, DC 20016
202/745-0300
Counsel of Record

July 13, 1990

Civ. Action No. 86-3234

United States District Court

FOR THE DISTRICT OF COLUMBIA

Filed May 7, 1990

Frederick A. Siegert, Ph.D.

Plaintiff,

v.

H. Melvyn Gilley, Ph.D.,

Defendant.

ORDER

Pursuant to the opinion issued in this case by the Court of Appeals, *see Siegert v. Gilley*, No. 88-5257, slip op. (D.C. Cir. Feb. 9, 1990), and in compliance with the instructions contained therein, and given that the mandate in this case has been issued, it is this 7th day of May 1990, hereby

ORDERED that this case is DISMISSED.

Stanley Sporkin
United States District Judge

No. 88-5257

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1989 C.A. 86-03234 Filed April 16, 1990

Frederick A. Siegert, Ph.D.

v.

H. Melvyn Gilley, Ph.D.,

Appellant

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle and Thomas, Circuit Judges

ORDER

Appellee's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner
Deputy Clerk

A statement of Chief Judge Wald concurring in the denial of rehearing *en banc* is attached.

Siegert v. Gilley, No. 88-5257

WALD, *Chief Judge*, concurring in the denial of rehearing *en banc*: Our court's "heightened pleading standard" which requires of plaintiffs a formidable threshold showing of nonconclusory facts demonstrating a government official's unconstitutional motive, raises serious questions of fairness and justification under existing Supreme Court precedent, especially when, as in this case, plaintiffs are precluded from obtaining through discovery the information necessary to make the necessary showing. Although the question is one of "exceptional importance," Fed. R. App. Proc. 35(a), I am satisfied that an *en banc* rehearing at this time would not alleviate the problem, which must ultimately be clarified by the Supreme Court.

No. 88-5257

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1989 C.A. 86-03234 Filed: April 16, 1990

Frederick A. Siegert, Ph.D.

v.

H. Melvyn Gilley, Ph.D.,

Appellant

BEFORE: Wald, Chief Judge; Buckley and D.H. Ginsburg, Circuit Judges

ORDER

Upon consideration of Appellee's Petition for Rehearing, filed March 26, 1990, it is

ORDERED, by the Court, that the Petition is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE, CLERK
BY:

Robert A. Bonner
Deputy Clerk

Chief Judge Wald would grant the Petition for Rehearing.

No. 88-5257

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Frederick A. SIEGERT, Ph.D.

v.

H. Melvyn GILLEY, PhD.,

Appellant.

Argued Oct. 11, 1989.

Decided Feb. 9, 1990.

Former government employee brought action against supervisor, alleging that supervisor, in response to request for information on job performance, wrote letter defamatory of employee, causing him reputational harm and loss of other government positions for which he had applied, and depriving him of constitutionally protected liberty interest without due process. The United States District Court for the District of Columbia, Stanley Sporkin, J., 692 F.Supp. 1406, denied defendant's motion to dismiss or alternatively for summary judgment based on qualified immunity, and defendant appealed. The Court of Appeals, Buckley, Circuit Judge, held that: (1) constitutional right claimed by plaintiff was not so clearly established that a reasonable person would have known that a candid response to official inquiry regarding job performance might give rise to liability for damages, and (2) conclusory allegation that letter was written maliciously and in bad faith did not satisfy heightened pleading standard for *Bivens* claims alleging unconstitutional motive.

Reversed and remanded with instructions.

Wald, Chief Judge, filed an opinion dissenting in part.

1. Federal Courts 542

Court of Appeals had duty to raise sua sponte issue of its own jurisdiction.

2. United States 50.20

Inquiry into subjective intent unrelated to knowledge of the law is permissible when conducting a qualified immunity inquiry into a *Bivens* claim where the constitutional violation turns on an unconstitutional motive; however, under heightened pleading standard, in order to obtain even limited discovery, such intent must be pleaded with specific, discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent.

3. United States 50.10(4)

Supervisor was entitled to qualified immunity from *Bivens* claim brought by former government employee based on allegation that supervisor wrote letter defamatory of employee in response to request for information on job performance, causing him reputational harm and loss of other government positions for which he had applied, thereby depriving him of a constitutional protected liberty interest without due process; constitutional right claimed by employee was not so clearly established that a reasonable person would have known that a candid response to inquiry regarding job performance might give rise to liability for damages. U.S.C.A. Const. Amend. 5.

4. United States 50.20

Government employee's conclusory allegation that supervisor, in response to request for information on employee's job performance, wrote defamatory letter with bad faith and malice, did not satisfy heightened pleadings standard for *Bivens* claims alleging unconstitutional motive; absent any direct evidence that letter was in fact written maliciously, supervisor could not be forced to endure discovery, and was entitled to qualified immunity.

Appeal from the United States District Court for the District of Columbia (D.C. Civil No. Misc. 86-3234).

John M. Facciola, Asst. U.S. Atty., with whom Jay B. Stephens, U.S. Atty., and John D. Bates, R. Craig Lawrence, and Michael L. Martinez, Asst. U.S. Attys., Washington, D.C., were on the brief, for appellant.

Nina Kraut, Washington, D.C., for appellee.

Before WALD, Chief Judge, and BUCKLEY and D.H. GINSBURG, Circuit Judges.

Opinion for the court filed by Circuit Judge BUCKLEY.

Opinion dissenting in part filed by Chief Judge WALD.

BUCKLEY, Circuit Judge:

This appeal involves a suit by Dr. Frederick Siegert, a psychologist, against Dr. Melvyn Gilley, his one-time supervisor at a government hospital. Both are government employees. The complaint alleges that Gilley, in response to a request for information on job performance, wrote a letter defamatory of Siegert, causing him reputational harm and the loss of other government positions for which he had applied. Siegert further alleges that Gilley wrote the letter maliciously and in bad faith, thus depriving him of a constitutionally protected liberty interest without due process.

Defendant Gilley appeals an order of the district court denying his motion to dismiss or alternatively for summary judgment based on qualified immunity grounds. Because we find that Siegert's allegations do not meet the heightened pleading standard established by our prior decisions for cases involving claims of immunity, we reverse the district court and remand with instructions to dismiss.

I. BACKGROUND

Plaintiff Siegert was a psychologist employed by the federal government at St. Elizabeths Hospital in Washington, D.C. from November 1979 until October 1985 as a Behavior Therapy Coordinator specializing in work with mentally retarded children and,

to a lesser extent, with adults. In January 1985, defendant Gilley became head of the division for which Siegert worked. The following month, Siegert was allegedly struck on the head by a patient. He claims he took a significant amount of medical leave as a result, although he was erroneously recorded as absent without leave.

St. Elizabeths notified Siegert in late August that it was preparing to terminate him. After a meeting with hospital officials, it was arranged that Siegert would resign from the hospital and thus avoid a termination that might damage his reputation. He had been planning a move in any event, he asserts, because he had experienced personal antagonism with Gilley. He had in fact already signed a 36-month contract to serve as a clinical psychologist at a U.S. Army medical facility in Bremerhaven, West Germany.

Siegert resigned from St. Elizabeths in October and took his position with the Army. Because of the requirement that he be "credentialed" to work in hospitals operated by the Army, Siegert signed a "Credential Information Request Form" asking that St. Elizabeths provide "all information on job performance and the privileges" he had enjoyed while a member of its staff to his prospective supervisor, Lt. (now Col.) William Smith. This request was referred to Gilley who, on October 23, 1985, wrote Smith that he considered Siegert to be inept, unethical, and one of the least trustworthy persons he had supervised during his thirteen years at St. Elizabeths.

Subsequently, Siegert was denied the credentials. He was also turned down for a position he later sought with an Army hospital in Stuttgart. He was thereafter given provisional credentials, but they were limited to work with adults. Although credentialing appeals are still pending, Siegert has been removed from the behavior therapy program and given work in an Army medical library, work he claims is in no way comparable to his previous responsibilities.

After learning of Gilley's letter to Smith, Siegert filed this action in the United States District Court for the District of Columbia alleging that Gilley's defamatory statements had

deprived him of liberty without due process, a violation of his Fifth Amendment rights for which he seeks damages under the doctrine of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In addition, Siegert brought claims under the court's pendent jurisdiction. Defendant Gilley moved for dismissal or in the alternative for summary judgment based on his defense of qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 Ed.2d 396 (1982).

The district court denied the motion to dismiss or for summary judgment on the ground that the record was insufficiently developed. The court ordered discovery limited to the taking of depositions from the parties and Col. Smith. *Siegert v. Gilley*, Civ. Action No. 86-3234, Order at 3, 1987 WL 27640 (D.D.C. Dec. 3, 1987). Gilley moved for reconsideration and for a stay of discovery pending resolution of his immunity claim.

On June 30, 1988, the court denied the motion to reconsider. *Siegert v. Gilley*, 692 F.Supp. 1406 (D.D.C.1988). The court only "reluctantly wrote this opinion because of counsel for the defendant's insistence that I had no right to establish a limited discovery schedule prior to issuing an opinion on the qualified immunity defense." *Id.* at 1420. The district court found that plaintiff had alleged a violation of a constitutionally protected liberty interest that was clearly established in the case law at the time of defendant's conduct. *Id.* at 1418. The court concluded that "[Gilley's] qualified immunity defense therefore fails," *id.*, and that Siegert had established a proper basis for a *Bivens* claim. *Id.* at 1419.

Defendant then filed this appeal. In an order issued on January 9, 1989, we rejected Siegert's motion to dismiss for want of a final order on the ground that a denial of a claim of qualified immunity is immediately appealable (citing *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)).

II. DISCUSSION

A. Scope of Appellate Jurisdiction

[1] The first issue before us is the scope of our jurisdiction to hear this appeal. Although the parties do not argue the question, this court has a duty to raise *sua sponte* the issue of its own jurisdiction. *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 740, 96 S.Ct. 1202, 1204, 47 L.Ed.2d 435 (1976). While it is well established that a denial of a claim of qualified immunity is immediately appealable, *Mitchell*, 472 U.S. at 530, 105 S.Ct. at 2817, the parties argue not only this issue, but also the district court's finding that a *Bivens* remedy is available in this case. For the reasons that follow, we conclude that our inquiry at this time is limited to the sole question of the district court's rejection of Gilley's claim of qualified immunity.

The statute establishing the parameters of appellate jurisdiction provides as follows:

> The courts of appeals ... shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States....

28 U.S.C. § 1291 (emphasis added). Because the proceeding before the district court has not been terminated, this appeal may only be heard because it involves an appeal from a special category of district court decisions identified by the Supreme Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). That category consists of final determinations of

> rights asserted in [an] action [that are] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Id. at 546, 69 S.Ct. at 1226. Typically, they involve rights which if not subject to immediate appeal may be lost irreparably. *Id.*

In this case, the collateral matter is the right asserted by Gilley not to be forced to trial or discovery because of his qualified immunity. In *Mitchell v. Forsyth*, 472 U.S. at 526-27, 105 S.Ct. at 2815-16, the Supreme Court recognized that the essence of a claim

of qualified immunity is that the immunized party has a positive right not to be brought to trial, and that this right is effectively lost once the case proceeds to trial. See also *Minotti v. Lensink*, 798 F.2d 607, 608 (2d Cir.1986) (denial of motion to dismiss for Eleventh Amendment immunity is immediately appealable because "the essence of the immunity is the possessor's right not to be haled into court—a right that cannot be vindicated after trial").

In this respect, Gilley's claim of immunity is distinct from his other defenses. It alone can be characterized as a defense that is finally determined by the court and lost if the case goes to trial. In contrast, Gilley's claim that he committed no constitutional violation or that there is no cause of action under *Bivens* are both claims that even if decided against him by the district court can be meaningfully vindicated through the normal course of appeal and reversal. Moreover, the *Bivens* issue might never come before us if the district court finds plaintiff's claim inadequate on other grounds. We conclude, then, that the only issue now properly before us on appeal is that of Gilley's qualified immunity.

B. Heightened Pleading Standard for *Bivens* Claims Alleging Unconstitutional Motive

In determining the validity of defendant's claim of immunity as a government official, we begin by recognizing the recasting of qualified immunity law in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 LEd.2d 396 (1982). Prior to *Harlow*, the prevailing standard contained both objective and subjective elements; thus a federal official's claim of immunity would be defeated if "he knew or reasonably should have known" that his actions would violate an individual's constitutional rights, or if he "took the action with the malicious intention to cause a deprivation of constitutional rights or other injury...." *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1001, 43 LEd.2d 214 (1975) (emphasis in original). The *Harlow* Court recognized that under the *Strickland* rule, one of the primary goals of the qualified or "good faith" immunity doctrine, the termination of meritless claims at the earliest possible stage of a litigation, was frustrated by the discovery required to prove the subjective element. 457 U.S. at 815-16, 102 S.Ct. at 2736-37. Therefore, the Court concluded that "bare allegations of

malice [would] not suffice to subject government officials to the costs of trial or burdens of broad-ranging discovery." *Id.* at 817-18, 102 S.Ct. at 2738. Instead, to overcome the qualified immunity that ordinarily attaches to government officials performing discretionary functions, a plaintiff must show that the defendant violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S.Ct. at 2738. The Supreme Court has subsequently described that "reasonable person" standard as having "purged qualified immunity doctrine of its subjective components," *Mitchell v. Forsyth*, 472 U.S. 511, 517, 105 S.Ct. 2806, 2810, 86 L.Ed.2d 411(1985), and as having "rejected inquiry into state of mind in favor of a wholly objective standard." *Davis v. Scherer*, 468 U.S. 183, 191, 104 S.Ct 3012, 3017, 82 L.Ed.2d 139 (1984).

As we pointed out in *Halperin v. Kissinger*, 807 F.2d 180, 186-87 (D.C.Cir.1986), it is by no means clear that the Supreme Court intended this expansive language to preclude any inquiry into subjective motivation. Thus in *Martin v. D.C. Metro. Police Dep't*, 812 F.2d 1425 (D.C.Cir.1987), we read *Halperin* as saying that the *purely* objective standard of inquiry was reserved for the national security context, and that otherwise

> when the governing precedent identifies the defendant's intent (unrelated to knowledge of the law) as an essential element of plaintiff's constitutional claim, the plaintiff must be afforded an opportunity to overcome an asserted immunity with an offer of proof of the defendant's alleged unconstitutional purpose.

Id. at 1433 (citations omitted).

Having determined that plaintiff must be afforded the opportunity to prove such allegations of unconstitutional motive, we now turn to the wholly separate inquiry into the standard of pleading required of plaintiffs in cases involving such allegations. In *Hobson v. Wilson*, 737 F.2d 1, 29-30 (D.C. Cir.1984), we first recognized the danger that plaintiffs might allege facts consistent with lawful conduct and append a claim of unconstitutional motive, thus imposing on officials the very costs and burdens of discovery and possibly trial that *Harlow* intended to spare them. *Id.*

at 29. We then concluded, in *dicta*, that in claims of unconstitutional motive, plaintiffs must come forward with some "nonconclusory" allegations of evidence in order to proceed. *Id.*

In *Smith v. Nixon*, 807 F.2d 297 (D.C.Cir.1986), we adopted the *Hobson* rationale and held that damage actions against government officials are subjected to a heightened pleading standard, so that "bare allegations of improper purpose, like the bare allegations of malice rejected in *Harlow*, do not suffice to drag officials into the mire of discovery." *Id.* at 200 (citations omitted). And in *Martin v. D.C. Metro. Police Dep't*, the same case in which we recognized the need to allow offers of proof of unconstitutional motive, we nonetheless recognized that such an offer must conform to a higher standard than that generally provided for in the Federal Rules:

> Where the defendant's subjective intent is an essential component of plaintiff's claim, once defendant has moved for pre-trial judgment based on a showing of the objective reasonableness of his action, then plaintiff, to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some direct evidence that the officials' actions were improperly motivated must be produced if the case is to proceed to trial.

812 F.2d at 1435.

Most recently, in *Whitacre v. Davey*, 890 F.2d 1168 (D.C. Cir.1989), we considered a *Bivens* claim alleging age-based discrimination in violation of the Fifth Amendment. We found that the complaint, as it alleged an unconstitutional motive, had to include "nonconclusory allegations of evidence of such intent in order to survive a motion to dismiss." *Id.* at 1171 (internal quotations omitted). "If a plaintiff fails to allege direct evidence of unconstitutional intent, his claim must be dismissed immediately." *Id.* at 1171 n. 4. Thus, *Whitacre* makes clear that discovery is not to be allowed until plaintiff has alleged the existence of direct evidence of impermissible motive.

[2] To summarize the applicable law: Inquiry into subjective intent unrelated to knowledge of the law is permissible where the constitutional violation turns on an unconstitutional motive. Nonetheless, under this court's heightened pleading standard, in order to obtain even limited discovery, such intent must be pleaded with specific discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent.

C. Application in this Case

To overcome Gilley's defense of immunity, Siegert may plead one of two types of claims. If he alleges that the action was objectively unlawful, he must plead that no reasonable official in Gilley's position "could have believed [his actions] to be lawful, in light of clearly established law...." *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987). In the alternative, if the alleged constitutional violation turns on some element of subjective intent, then Siegert must plead the unconstitutional motivation and do so with the offer of proof required by our heightened pleading standard.

While we believe Siegert's suit is grounded in his allegations of bad faith and malice, an indulgent reading of the complaint would also find, in its reference to defamation *per se*, an allegation of a cause of action under clearly established law that is independent of the element of intent. This appears to have been the district court's reading of the complaint as the bulk of its analysis is devoted to comparing Siegert's situation with those addressed in our prior decisions in *Doe v. United States Dep't of Justice*, 753 F.2d 1092 (D.C.Cir.1985), and *Bartel v. FAA*, 725 F.2d 1403 (D.C.Cir.1984), cases that did not involve claims of impermissible subjective intent. Adopting this reading, we nevertheless find that Siegert has failed both of the routes that lead to overcoming Gilley's official immunity in this case.

1. *Objective Legality of Gilley's Actions in Light of Pre-existing Law*

[3] The Supreme Court's recent decision in *Anderson* makes clear that the constitutional right alleged to have been violated is not to be defined in such abstract terms as to make it "impossible for officials reasonably to anticipate when their con-

duct may give rise to liability for damages." *Id.*, 483 U.S. at 639, 107 S.Ct. at 3039 (internal quotation omitted). Rather,

> the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Id. at 640, 107 S.Ct. at 3039. While the Court noted that the very act in question need not have been held unlawful, nonetheless "in the light of pre-existing law the unlawfulness must be apparent." *Id.*

While the district court seems to have recognized this principle, 692 F.Supp. at 1412, it has misapplied the standard to the facts of this case. The district court relied on *Doe* and *Bartel* to establish that it is a violation of a constitutionally protected liberty interest when "the government is the source of the defamatory allegations and the resulting stigma involves some tangible change of status vis-a-vis the government." *Siegert* 692 F.Supp. at 1415 (internal quotations omitted).

Although *Doe* and *Bartel* may stand for that proposition, and although the district court attempts an analogy between this case and *Bartel*, 692 F.Supp. at 1416, the effort fails because the court's definition of the right at issue in this case was insufficiently particularized to meet the requirements of *Anderson*. *Doe* involved the discharge of a Department of Justice employee who was at the same time accused by her supervisors of unprofessional conduct and dishonesty; it did not involve, as this case does, a response by a government official to a request for information about a former employee from a prospective government employer.

This is not an insignificant difference. Common law defamation itself recognizes both that there is a qualified privilege for reports on employees to prospective employers, Smolla, Law of Defamation § 8.08[2][d], and that the privilege is more likely to be applicable when the information given is in response to a request rather than volunteered. *Id.* § 8.08[2][b]. These common law privileges carry over into our due process analysis as it is the

government's involvement, through Gilley, that "transforms a [common law] defamation into a [constitutional] deprivation of liberty." *Doe*, 753 F.2d at 1108 (internal quotation and citation omitted). Even if the district court were to be found correct in its view that there is no constitutionally significant difference between terminating an employee directly amidst stigmatizing allegations and merely responding to a solicitation for a job reference, such a view cannot be said to follow ineluctably from *Doe*.

Bartel fares no better. While that case did involve a supervisor who, upon hearing of a former employee's attempt to gain another position, sent letters to several Federal Aviation Administration officials critical of the plaintiff, the letters were not sent in response to a request for an evaluation of a former employee. They were volunteered. In the instant case, by contrast, Gilley responded to a request for information about the employee's performance. Although there is some dispute as to whether the evaluation sought here was "subjective" or "objective," the relevant question, under *Anderson*, is not whether Gilley misunderstood the nature of the information requested, but whether the constitutional right claimed by Siegert was so clearly established that a reasonable person would have known that a candid response to such an official inquiry might give rise to liability for damages.

We conclude that while *Doe* and *Bartel* illustrate circumstances in which a government official's stigmatizing comments will violate a former employee's protected liberty interest by effecting a change in his status vis-a-vis the government, they do not "clearly establish," within the meaning of *Harlow*, that Gilley's actions amounted to such a violation.

2. *The Heightened Pleading Standard Applied to Siegert's Claim of Unconstitutional Motive*

[4] Siegert's central contention, of course, is that defendant wrote the letter with bad faith and malice; and in light of our analysis immediately above, it represents the only basis on which he can hope to overcome Gilley's claim of privilege. We assume, without deciding, that such bad faith motivation would suffice to make Gilley's actions in writing the letter a violation of Siegert's

constitutional rights, and that the process given by the credentialing review was not adequate to meet due process requirements. Nonetheless, we find that the invalidating motivation has not been pleaded with the offer of noncircumstantial proof required to satisfy our heightened pleading standard. *Cf. Whitacre*, 890 F.2d at 1171.

Siegert's allegation of malice is unsupported by any evidence beyond innuendo about "long-standing and consistent professional and personal friction between defendant and himself." Amended Complaint, para. 6. The complaint's shortcoming is most evident in its allegations that Gilley had acted in bad faith when he described Siegert as inept, unethical, and untrustworthy. *Id.* at para. 11. It merely asserts (and reasserts) that in making the statement he "knew [it] to be false or [made it] with reckless disregard as to whether it was true," *id.* at paras. 11 and 23, and that he "maliciously and in bad faith attempted to destroy ... plaintiff's ability to earn a livelihood as a clinical psychologist." *Id.* at para. 21. Nor did the affidavit submitted by Siegert in support of his Statement of Material Facts at Issue add anything more tangible to the record than the assertions that prior to the time Gilley became his supervisor, he had received exemplary job performance ratings, had never had his professional integrity questioned, and that his resistance to certain changes Gilley wished to make in St. Elizabeths' programs was the source of Gilley's hostility towards him. Affidavit of Frederick A. Siegert dated January 28, 1988, paras. 4-5.

As we emphasized in *Hobson*, "conclusory allegations" of this sort will not suffice to subject government officials to the burdens of discovery or trial. 737 F.2d at 290. *Hobson* itself provides an example of allegations of direct evidence of improper motivation that will overcome a defense of qualified immunity. In that case, it was alleged that the Federal Bureau of Investigation and District of Columbia law enforcement authorities had violated plaintiffs' First and Fifth Amendment rights pursuant to an organized plan, known as "COINTELPRO-New Left," that was "designed to conduct surveillance upon and to cause disruption of" plaintiffs' protected political activities. *Id.* at 27. The complaint referred to specific memoranda admitting that the program's ex-

press purpose was to disrupt plaintiffs' political activities. *Id.* at 10. We easily found these allegations to be "neither general, conclusory, nor devoid of factual support " *Id.* at 31.

Siegert has alleged nothing remotely comparable. His assertions are no less inferential than the factual support offered by the plaintiffs in *Martin* that we rejected as insufficient. 812 F.2d at 1486. In that case, which involved charges of malicious prosecution by District of Columbia police officers, the plaintiff alleged that the defendant had reviewed video tapes of newscasts showing policemen beating him with nightsticks, that the plaintiff was the only person identified and marked for prosecution as a result of that review, that the defendants had worked closely with the U.S. Attorney in deciding on his subsequent arrest and prosecution, and that an unusually large team of officers had effected his arrest. 812 F.2d at 1485. We remarked that although in the ordinary case such circumstantial evidence "might allow a plaintiff to remain in court," in light of *Harlow*, it was insufficient to override a defense of qualified immunity. While it is true that in *Martin* we allowed limited discovery, we did so only as a "one-time exception" because of the special exigencies in that case. *Whitacre*, 89 F.2d at 1171 n. 4 (citing *Bartlett v. Bowen*, 824 F.2d 1240, 1246 (D.C. Cir.1987)).

It might be argued, nevertheless, that the highly restricted discovery ordered by the district court in this case is supported by the Supreme Court's decision in *Anderson*. In a footnote to its opinion, the Court suggested that if a plaintiff alleges actions that no reasonable official could believe lawful, and the defendant in turn alleges he in fact took *different* actions that a reasonable official *could* believe lawful, then limited discovery "tailored specifically to the question of [defendant's] qualified immunity" might be necessary. 483 U.S. at 646-47 n. 6, 107 S.Ct. at 3042 n. 6. This is not the situation before us. The purpose of the inquiry ordered by the district court in this case was not to establish the factual basis for determining the objective legal reasonableness of Gilley's actions, but to inquire into their motivation. This is precisely the kind of subjective inquiry that *Harlow* found impermissible. 457 U.S. at 817, 102 S.Ct. at 2737.

III. CONCLUSION

The requirements of our heightened pleading standard are clear. But instead of meeting them, Siegert asks the court to infer from his claims of personal friction, exemplary job performance ratings before Gilley became his supervisor, and his conclusory assertion that defendant knew his statements to be false, that Gilley wrote the letter with a constitutionally impermissible intent. As Siegert has failed to offer any direct evidence that the letter was written maliciously, we see no basis for submitting Gilley to the burden of discovery.

Accordingly, we reverse the district court's denial of defendant's motion for reconsideration, vacate the court's order that the parties proceed with discovery, and remand with instructions that the case be dismissed.

It is so ordered.

WALD, Chief Judge, dissenting in part:

This case brings into sharp focus a dilemma created by our circuit's current jurisprudence on qualified immunity: plaintiffs are required to adhere to a "heightened pleading standard" of nonconclusory facts that demonstrate a government official's unconstitutional motive, but they are entirely restricted from obtaining through discovery the information necessary to make that showing. While I do not agree completely with the trial judge's resolution of the qualified immunity issue, I also find the majority's outright dismissal of Siegert's action unnecessary and inappropriate in the circumstances of this case. Although I too would vacate the trial judge's finding of no qualified immunity, I would allow a limited discovery, similar to that ordered by the judge, to proceed on remand to permit the plaintiff to make a showing of unconstitutional motive, if he can.

I. THE HEIGHTENED PLEADING STANDARD

The qualified immunity defense is designed to prevent "bare allegations of malice" from subjecting government officials to the disruptions of litigation, including "the burdens of broad-reaching discovery." *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

Consistent with this instruction, this circuit has required plaintiffs challenging qualified immunity defenses to provide "some factual allegations [to] support claims of unconstitutional motive" on the part of defendant officials. *Hobson v. Wilson*, 737 F.2d 1, 30 (D.C.Cir.1984). This heightened pleading standard "bears on the degree of *factual* specificity required in plaintiff's complaint." *Martin v. Malhoyt*, 830 F.2d 237, 254 n. 41 (D.C. Cir.1987) (emphasis in original). It is applied once the defendant makes a showing of the objective legal reasonableness of his actions; at that point, plaintiffs must offer "some direct evidence that the officials' actions were improperly motivated" to avoid pre-trial dismissal. *Martin v. D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1435 (D.C.Cir. 1987).

A plaintiff who has good reason to suspect but lacks specific evidence of an official's unconstitutional motive therefore faces a threshold problem: how to gain enough information to survive the defendant's motion to dismiss or motion for summary judgment on the grounds of qualified immunity. The majority offers a straightforward answer: "If a plaintiff fails to allege direct evidence of unconstitutional intent, his claim must be dismissed immediately." Maj.Op. at 802 (citing *Whitacre v. Davey*, 890 F.2d 1168, 1171 n. 4 (D.C.Cir.1989)). If the plaintiff cannot plead "specific, discernible facts or offers of proof that constitute direct... evidence of the intent," he is out of court. Maj.Op. at 802.

II. THE ROLE OF LIMITED DISCOVERY

I believe that this application of the "heightened pleading standard" reflects a misguided approach to our "twin goals" of "limit[ing] the litigation burdens placed on government officials by 'insubstantial' lawsuits" and "preserving the opportunity for plaintiffs to vindicate constitutional rights." *Martin v. D.C. Police*, 812 F.2d at 1439 (Edwards, J., concurring) (citing *Hobson*). In my view, the heightened pleading standard, as originally articulated by this court, did not rule out the opportunity in appropriate circumstances, where proof of the defendant's motive is peculiarly in the defendant's hands, for plaintiffs to examine the defendant's motive through limited discovery, directed and supervised by the trial court.

In *Hobson*, we expressly noted that "in some circumstances plaintiffs are able to paint only with a very broad and speculative brush at the pre-discovery stage, and that overly rigid application of the rule we articulate could lead to dismissal of meritorious claims." 737 F.2d at 331. We warned that plaintiffs who could not allege any specific facts supporting a claim of unconstitutional motive "cannot expect to involve Government actors in *protracted* discovery and trial." *Id.* at 30 (emphasis added). This comment, however, implicitly left open the possibility of some limited discovery before a final ruling on the qualified immunity claim.

In *Martin v. D.C. Police*, we vacated the district judge's dismissal of a qualified immunity defense on the grounds that she had not properly considered whether the complaint contained the factual specificity required by the heightened pleading standard. 812 F.2d at 1436. Rather than dismissing the case outright, however, we deferred a decision on qualified immunity pending limited, particularized discovery, monitored with "particular care and sensibility." *Id.* at 1437-38. *Martin* clearly indicated that "carefully circumscribed," "sharply limited" discovery ordered by the district judge is consistent both with preserving plaintiffs' constitutional rights and with enabling Government officials to avoid the rigors of "protracted" discovery. *Id.* at 1438-39 (Edwards, J., concurring); *id.* at 1437-38 (majority opinion) (noting district judge's discretion to defer decision on summary judgment motion to allow opponent of motion to pursue discovery).

In light of these precedents, I am deeply disturbed by the trend in our more recent cases, seeming to rule out categorically a trial judge's discretion to order such limited discovery, even in cases where he concludes it will be of genuine assistance and is not being pursued simply to harass the defendant. In so doing, we run the risk of applying the heightened pleading standard with needless insensitivity to both a legitimate plaintiff's plight, and to a district judge's perceptiveness in distinguishing a legitimate plaintiff from a frivolous one. In *Martin v. Malhoyt*, the panel reversed the district court's limited discovery order on the grounds that the plaintiffs had not made out even a *prima facie* showing of their claim that the defendant police official had countenanced a pattern of illegal police activity. 830 F.2d at 257. More recently, in

Whitacre v. Davey, another panel said that the "degree of specificity needed to make out a Title VII or statutory age discrimination *prima facie* case" did not meet the heightened pleading standard "when the constitutional tort alleged is of the same discrimination genre covered by the antidiscrimination statute." 890 F.2d at 1171. Since the Title VII *prima facie* case is "composed of only circumstantial evidence, and not overwhelming circumstantial evidence at that," it does not meet the "constitutional" heightened pleading standard applied in qualified immunity cases. *Id.* at 1171. And, additionally, absent a plaintiff's allegation of direct evidence of unconstitutional intent, "his claim must be dismissed immediately," that is, without even limited discovery. *Id.* at 1171 n. 4.

This policy of requiring specific, direct evidence of the defendant's unconstitutional intent, when unflinchingly applied to all cases in which a qualified immunity defense is raised, effectively cuts off both bona fide and ill-motivated suits. It blocks a judicial remedy to all plaintiffs who do not have access to the information they need to meet the heightened pleading standard, regardless of their ability to obtain such information without discovery. It is worth remembering that our heightened pleading standard has not as yet even been explicitly approved by the Supreme Court. Without limited discovery, many plaintiffs such as Siegert have no means of obtaining any direct evidence about a defendant supervisor's motive; such evidence, if it exists, most likely is buried in bureaucratic files. By denying even the most circumscribed judicially supervised factfinding into unconstitutional motive, we enable defendants who alone possess that crucial information to hide behind an unmerited shield of qualified immunity. Narrowly tailored discovery, controlled in scope and duration by a trial judge sensitive to the problems of exposing officials to disruptive litigation, on the other hand, allows worthy plaintiffs to mount reasonable challenges to otherwise impenetrable qualified immunity defenses.

Rather than being compelled to require plaintiffs independently to marshal the direct evidence of unconstitutional motive that is often peculiarly in the defendant's possession, the trial judge should be permitted to retain discretion to authorize circumscribed factfinding for plaintiffs who initially indicate with

some plausible evidentiary basis why the defendant's immunity claim will fail. A pleading standard focusing on the likely success of the plaintiff's complaint, rather than the quantity of factual evidence it adduces, would better accommodate both our articulated concerns about the speculative nature of pre-discovery pleadings, *Hobson*, 737 F.2d at 31, and our desire to maintain intact trial judges' "large authority to exercise control over discovery." *Martin v. D.C. Police*, 812 F.2d at 1437. In any event, requiring plaintiffs to "come forward with something more than inferential or circumstantial support for [their] allegation[s] of unconstitutional motive," *id.* at 1435, does not preclude a judge's use of limited discovery to enable a plaintiff to supplement his originally, perhaps necessarily, sketchy complaint.

Such limited discovery is, moreover, fully consistent with the Supreme Court's concern that eligible government officials be immunized from "broad-ranging discovery." *Harlow*, 457 U.S. at 817, 102 S.Ct. at 2737. As a first step in considering a defendant's liability, *Harlow* instructed the trial judge to determine "whether [currently applicable] law was clearly established at the time an action occurred." 457 U.S. at 818, 102 S.Ct. at 2738. "Until this threshold immunity question is resolved," the Court stated, "discovery should not be allowed." *Id.* If the law delineating the official's duty was not clearly established at the time of the alleged violation, the official cannot be held liable for failure to act in the objectively reasonable manner required by *Harlow*. But if the law on which liability is based on clearly established at the time of the alleged violation, "*this* threshold immunity question" (emphasis added) does not end the inquiry. Then, the precise nature of the defendant's alleged violation—for example, whether the defendant acted with a constitutional or unconstitutional motive— is placed squarely in issue in the qualified immunity determination. As a result, discovery "tailored specifically to the question of [the defendant's] qualified immunity" "may be necessary" before the trial judge can rule on the defendant's summary judgment motion. *Anderson v. Creighton*, 483 U.S. 635, 646-47 n. 6, 107 S.Ct. 303, 3042 n. 6, 97 L.Ed.2d 523 (1987).

As I read the Supreme Court's directives, once the trial judge determines that the plaintiff has asserted a clearly established right,

some discovery may well be appropriate before the judge rules on the qualified immunity defense. The majority's approach, however, slams shut this window for discovery through its unyielding application of the heightened pleading standard requiring direct proof of unconstitutional motives up front in the initial pleadings. Failure to provide any leeway for plaintiffs or trial judges, regardless of circumstances, to obtain evidence of illegal motives through limited discovery controlled by the trial judge is, in my view, not only unfair but unjustified by existing Supreme Court precedent.

III. APPLICATIONS TO THIS CASE

The trial judge here did not complete the prescribed qualified immunity analysis. He correctly determined that Siegert's right to a good faith evaluation by his supervisor was clearly established at the time, but he appears not to have considered whether Siegert's factual pleadings of Gilley's malicious motives met the heightened pleading standard. Consequently, his finding that Gilley's qualified immunity defense fails, *Siegert v. Gilley*, 692 F.Supp. 1406, 1418 (D.D.C.1988), must be vacated.

I believe, however, that Siegert's pleadings contained the necessary specificity to warrant limited discovery before a judicial resolution of the qualified immunity issue. Siegert's Affidavit states that Gilley had embarked on a course of making Siegert's professional life at St. Elizabeths Hospital unpleasant because he resented Siegert's lengthy medical leave and Siegert's resistance to Gilley's attempts to alter St. Elizabeths Hospital's behavior modification program. Affidavit of Frederick A. Siegert ("Siegert Affidavit") ¶¶ 4, 6, Joint Appendix ("J.A.") at 25. A reading of the Affidavit, together with Siegert's Amended Complaint, J.A. at 6, leaves little doubt that Siegert is claiming that because Gilley harbored these resentments, he maliciously wrote a highly derogatory reference letter. However inartfully, Siegert has done more than merely allege malice; he has provided some evidentiary basis for his contention that Gilley's motives were malicious and, by extension, unconstitutional. He has demonstrated with some plausibility that armed with sufficient evidence, he might defeat Gilley's claim to qualified immunity. Other circumstances set out in the pleadings lend some support to his theory: Siegert's history of excellent

ratings until Gilley became his supervisor, Siegert Affidavit ¶ 5, J.A. at 25, and the extreme language of the evaluation itself, Amended Complaint ¶ 11, J.A. at 8, which inherently casts doubt on the author's neutrality. The trial judge certainly had some basis for permitting a limited inquiry into motive.

Accordingly, I believe that a remand with instructions to allow Siegert limited discovery—indeed, discovery much along the lines that the trial judge already ordered, albeit for a merits determination—would be in order. If such circumscribed discovery, directed solely to Gilley's motives, were productive, Siegert could then amend his complaint to conform to the heightened pleading requirement. Without such an opportunity, I believe that Siegert has been denied the opportunity to vindicate his constitutional rights. I therefore respectfully dissent from the majority's outright dismissal of his case.

No. 88-5257

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988 C.A. No. 86-03234 Filed Jan. 9, 1989

Frederick A. Siegert, Ph.D.

v.

H. Melvyn Gilley, Ph.D.,

Appellant

BEFORE: Starr, Williams and Sentelle, Circuit Judges

ORDER

Upon consideration of appellee's motion to dismiss and appellant's opposition thereto, it is

ORDERED that the motion be denied. The district court conclusively resolved the claim of qualified immunity, and that order is immediately appealable. *See Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1986); *see also McSurely v. McClellan*, 697 F.2d 309, 316 (D.C. Cir. 1982).

Per Curiam

Civ. Action No. 86-3234.

United States District Court

FOR THE DISTRICT OF COLUMBIA

Frederick A. SIEGERT, Plaintiff,

v.

H. Melvyn GILLEY, Defendant.

June 30, 1988.

Psychologist brought action against his former government supervisor to recover for deprivation of due process liberty interest as result of supervisor's alleged defamation and to recover on state law claims of defamation, intentional infliction of emotional distress, and interference with contractual relations. The District Court, Sporkin, J., denied supervisor's motion for dismissal or summary judgment. Supervisor moved for reconsideration. The District Court held that (1) psychologist stated actionable deprivation of liberty interest as result of supervisor's alleged defamation after psychologist resigned from government employment, and (2) supervisor was not entitled to qualified immunity.

Motion denied.

1. Constitutional Law 278.4(3)

Allegations that defamation by psychologist's supervisor in prior employment at government hospital caused inability to obtain credentials for working with children as psychologist for United States Army, loss of employment at Army hospital, inability to obtain another government position as psychologist, and inability to practice profession adequately claimed stigma foreclosing freedom to take advantage of other employment opportunities and stated deprivation of liberty interest under due process clause; psychologist alleged more than mere harm to reputation. U.S.C.A. Const. Amends. 5, 14.

2. Civil Rights 13.8(1)

Former psychologist's liberty interest was clearly established when psychologist's supervisor during prior employment at government hospital allegedly defamed psychologist and caused inability to obtain credentials to work with children as United States Army psychologist, loss of employment with Army, and inability to obtain another government position as psychologist or to practice profession, and, thus, supervisor was not entitled to qualified immunity. U.S.C.A. Const. Amends. 5, 14; 42 U.S.C.A. §1983.

3. Constitutional Law 278.4(1)

Common-law defamation is transformed into constitutional deprivation of liberty under due process clause when government is source of defamatory allegations and resulting stigma involves some tangible change of status vis-a-vis government. U.S.C.A. Const. Amends. 5, 14.

4. Constitutional Law 278.4(1)

Fact that former psychologist possessed no property interest in original position at government hospital or in positions as psychologist for United States Army did not interfere with invocation of liberty interest under due process clause when government defamation caused loss of liberty and change in legal status. U.S.C.A. Const. Amends. 5, 14.

5. Constitutional Law 278.4(1)

Alleged defamation by former government supervisor causing loss of subsequent and future employment as psychologist did not need to occur in conjunction with resignation from government hospital, could occur incident to loss of subsequent employment as psychologist for United States Army, and, therefore, was actionable deprivation of liberty interest under due process; harm to reputation plus something else such as discharge or foreclosure of future opportunity was required to state actionable deprivation of liberty interest; and order in which they occurred was irrelevant. U.S.C.A. Const. Amends. 5, 14.

6. Constitutional Law 278.4(1)

Former government supervisor, who allegedly defamed psychologist after psychologist resigned from position at government hospital and obtained position as psychologist for United States Army could deprive psychologist of liberty interest under due process clause without denying him legal right; alleged defamation caused loss of job with Army and loss of professional standing. U.S.C.A. Const. Amends. 5, 14.

7. Constitutional Law 278.4(1)

Psychologist, who was allegedly deprived of liberty interest as result of former government supervisor's defamation, did not have substantially adequate remedy through comprehensive personnel scheme and was entitled to pursue remedy for violation of due process; defamation allegedly caused loss of position as psychologist for United States Army, loss of opportunity to work at another hospital, inability to obtain credentials, and harm to reputation in professional community. U.S.C.A. Const. Amends. 5, 14; 5 U.S.C.A. § 1101 et seq.

8. Federal Courts 15

Pendent jurisdiction over claims for defamation, intentional infliction of emotional distress, and interference with contractual relations was appropriate in action alleging deprivation of liberty interest under due process clause as result of defamation by former government supervisor. U.S.C.A. Const. Amends. 5, 14.

Nina Kraut, Washington, D.C., for plaintiff.

John M. Facciola, Asst. U.S. Atty., District of Columbia, Washington, D.C., for defendant.

MEMORANDUM OPINION
AND ORDER

SPORKIN, District Judge.

This case involves a claim by a clinical psychologist who was formerly employed at Saint Elizabeths Hospital and is now working as a librarian in Germany. Plaintiff claims that defendant deprived him of his due process rights and he has brought this action pursuant to the Fifth Amendment of the Constitution and the *Bivens* doctrine. He has also invoked the pendent jurisdiction of this court for his common law claims of defamation, intentional infliction of emotional distress and interference with contractual relations.

Plaintiff filed this lawsuit on November 25, 1986, slightly less than a year after he discovered allegedly defamatory communications between defendant and officials at his new place of employment had caused him to lose his new job. The theory of plaintiff's constitutional claim is that defendant's publication of defamatory remarks led not only to severe harm to his reputation but also caused an infringement of his "liberty interests" in violation of the protections provided by the due process clause of the Fifth Amendment to the United States Constitution. Plaintiff seeks damages under the principles first expounded in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

Defendant made a motion to dismiss the action, or in the alternative, for summary judgment, on several grounds, including the contention that even accepting his factual allegations, plaintiff had failed to show an infringement of any right protected by the Constitution. Defendant also asserted that the doctrines of qualified im-

munity and absolute immunity protect him against liability for any of plaintiff's claims. After hearing oral argument, I determined that because plaintiff had not obtained any discovery, the record was insufficiently developed to permit either dismissal or summary judgment. I found that a sharply circumscribed amount of discovery was warranted. Accordingly, I ordered the parties to take the testimony of the two principal actors in this affair—plaintiff, Dr. Siegert, and defendant, Dr. Gilley.

This case is now before me on defendant's Motion for Reconsideration and for a Stay of Discovery Pending Resolution of Defendant's Immunity Claim. Defendant urges me to reconsider my December 3, 1987 Order for a number of reasons. Defendant's core contention is that by ordering depositions before making a final determination on his motion for summary judgment:

> the Court, in a manner that is, we submit, contrary to the established method in this Circuit of resolving immunity claims in *Bivens* cases, ordered discovery which neither party sought in a case with undisputed facts. We respectfully submit that the Court clearly erred by conditioning the resolution of the defendant's motion for summary judgment, based on his immunity, on the parties's engaging in discovery when the fundamental facts bearing on Dr. Gilley's immunity were not in dispute.

Memorandum of Points and Authorities in Support of Defendant's Motion for Reconsideration and for a Stay of Discovery Pending Resolution of Defendant's Immunity Claim (hereinafter "Defendant's Brief for Reconsideration") at 5. After careful consideration of defendant's motion, I have determined, as I did before, that his motion to dismiss, or in the alternative, for summary judgment, must be denied at this time. Despite defendant's insistence that "the court must resolve the motion for summary judgment before permitting any discovery," I reiterate that I am willing to hear renewed motions for summary judgment by either party after the completion of discovery.

THE FACTS

For the purposes of defendant's motion, the truth of the allegations in the complaint and plaintiff's supporting materials must be taken as true, and any ambiguities or uncertainties concerning the sufficiency of the claim must be resolved in favor of the plaintiff. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *Paul v. Davis*, 424 U.S. 693, 720, 96 S.Ct. 1155, 1169-1170, 47 L.Ed.2d 405 (Brennan, J. dissenting); *Walker Process Equipment Inc., v. Food, Machinery & Chemical Corp.*, 382 U.S. 172, 174-175, 86 S.Ct. 347, 348-349, 15 L.Ed.2d 247 (1965); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957); *Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1102 (D.C.Cir.1985); *Sinclair v. Kliendienst*, 711 F.2d 291, 293 (D.C.Cir. 1983). Although the defendant has labelled his motion one either for summary judgment or to dismiss, he has not put into evidence any affidavits which would contradict the substantive facts set forth by plaintiff.[1] I must therefore treat the facts alleged by plaintiff as admitted, as I would on a motion to dismiss. As the Supreme Court has asserted, "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 456, 78 S.Ct. at 101-102; *Hughes v. Rowe*, 449 U.S. 5, 10, 101 S.Ct. 173, 176, 66 L.Ed.2d 163 (1980).

The following allegations by plaintiff therefore must be accepted as the relevant facts for purposes of this motion:

According to plaintiff, he was employed as a clinical psychologist at St. Elizabeths Hospital, Washington, D.C. ("St. E's"), for approximately six years prior to his resignation on October 1, 1985. Defendant was plaintiff's immediate supervisor at St. E's for the year immediately preceding plaintiff's departure from St. E's.

[1] Plaintiff has placed into evidence his own affidavit, which relates the facts recounted below. Defendant has placed into evidence an affidavit by Dr. Eugene Stammeyer, the Director of Psychology at St. Elizabeths Hospital. Dr. Stammeyer's affidavit is largely devoted to explaining the process whereby Dr. Gilley was asked to respond to the inquiry about Dr. Siegert's credentials. Aside from a brief reference to the circumstances under which Dr. Siegert departed from St. E's, Dr. Stammeyer does not address the truth or falsity of Dr. Gilley's letter.

Plaintiff resigned from St. E's mainly because of long-standing personal and professional differences with defendant. Prior to his professional relationship with the defendant, plaintiff received exemplary job performance ratings from his supervisors.

In early September, 1985, plaintiff received advanced notice from St. E's that he was going to be terminated from his position at the Hospital. The termination was due, at least in part, to plaintiff's conflicts with the defendant. In September, plaintiff met with officials at the Hospital and reached an agreement that if he resigned from his position, a letter of removal would not appear in his personnel file. In reaching such an agreement, plaintiff sought to protect his future job prospects and his good standing in his professional community. On October 1, 1985, pursuant to the agreement, plaintiff resigned from his position at St. E's.

Concurrent with his removal/resignation from St. E's, plaintiff was in the process of obtaining a position as a clinical psychologist at the United States Army Medical Department Activity ("USAMDA") in Bremerhaven, West Germany. He was seeking a position for personal reasons – he wanted to re-join a woman with whom he had a relationship and who lived there.

On or about August 30, 1985, plaintiff entered into a 36 month contract with USAMDA to work as a clinical psychologist in the Exceptional Family Member Program in Bremerhaven. His duties were to consist primarily of working with children on an out-patient basis. He also would work with members of the children's families. Plaintiff had considerable experience working with children in the past, both at St. E's and in other former positions. Working with children is plaintiff's area of specialty and expertise and he has trained other counselors in areas relating to child development and behavior therapy.

A condition of plaintiff's employment with the Department of the Army is that he be "credentialed" as to the treatment of children and, independently, as to the treatment of adults. Although the record is neither clear nor developed as to the actual meaning of "being credentialed" in the profession of psychology, it appears that a psychologist must be credentialed for certain professional activities by any given hospital before he or she can be permitted

to practice in those areas.[2] In this case, pursuant to both the common practices of the profession, and specific Army regulations, plaintiff could only work professionally with children at USAMDA in Bremerhaven *after* he received his credentials from the Hospital there for working with children. The same was true for working with adults.

Plaintiff was credentialed to work with both children and adults at St. E's. Because he had been credentialed at his former hospital and because of his extensive experience and expertise in working with children, plaintiff expected that he would obtain his credentials in Bremerhaven without any difficulty.

In mid-October, 1985, William R. Smith, Jr., LTC, MC, Deputy Commander for Clinical Services and Chairperson of the Credentials Committee at the USAMDA, contacted St. E's to obtain credentials information about plaintiff. He spoke with defendant, Dr. Gilley. The content of their discussion would appear to be quite important. Although we do not know what was said, the conversation was followed by a letter, on October 23, 1985, which according to plaintiff, made totally false and unsubstantiated allegations about the plaintiff. This letter has been submitted under seal by defendant. I have examined the letter *in camera*. While I am not lifting the seal at this time, if the plaintiff is correct that the statements contained in the letter are false and misleading, they

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[2] According to plaintiff, who in turn is relying on the opinion of Dr. Russell Newman, the Director of Legal and Regulatory Affairs for the Practice Directorate of the American Psychological Association:

> "credentialing" is synonymous to "privileges" that are granted by a hospital's own medical staff or board. For example, if a person has a particular specialty, he or she is granted particular privileges in conformity with that specialty's standards or criteria for practice which have been established by the hospital's board, such as educational standards, years of practice and type and quality of supervision received. Once granted, "some element" of due process has to be adhered to by the board ... if the credentials are to be later revoked.

Plaintiff's Opposition to Defendant's Motion for Reconsideration and for a Stay of Discovery Pending Resolution of Defendant's Immunity Claim (hereinafter "Plaintiff's Opposition") at 2, n. 2.

would tend to give rise to a cause of action as plaintiff contends. In the letter, Dr. Gilley accuses the defendant of being inept, unethical, and untrustworthy among other things. Plaintiff claims these accusations are untrue and are totally inconsistent with the fact that he received exemplary job performance ratings from his superiors for five years. It is clear that at some point in this case, the substance of the letter and plaintiff's employment record will have to be reconciled.

According to plaintiff, as a result of the information provided to Colonel Smith by defendant, plaintiff was denied his credentials by USAMDA for working with children. Plaintiff was informed by Colonel Smith that the reports they received about him from St. E's were "extremely unfavorable" and that the Credentials Committee therefore recommended that he not be credentialed. The decision to deny plaintiff his credentials was appealed by plaintiff. Plaintiff recently learned that his appeal had been denied. *See* Plaintiff's Opposition to Defendant's Motion for Reconsideration and for a Stay of Discovery Pending Resolution of Defendant's Immunity Claim (hereinafter Plaintiff's Opposition") at 2, n. 1.

Because of the difficulty in obtaining credentials that he was experiencing at the hospital in Bremerhaven, plaintiff applied in the Summer of 1986 for a psychologist position at an Army base in Stuttgart. He obtained a position and reported for work on July 28, 1986. He "was literally turned away and was told that [he] was not wanted because of what they had heard about me from Bremerhaven personnel." *See* Siegert Affidavit at 5.

In September, 1986, plaintiff's credentials as to both adults and children were provisionally granted. Shortly thereafter, however, his credentials for treating children were revoked and he was involuntarily released from employment. Plaintiff brought this suit in November, 1986. Plaintiff was assigned to work in the medical library of the Army hospital at Bremerhaven until the resolution of several pending appeals of credentialing decisions. During the pendency of those appeals and this lawsuit, plaintiff "has been unable to find even remotely comparable employment." Plaintiff's Opposition at 2, n. 1.

ANALYSIS

Plaintiff's basis for bringing suit in this federal court is his *Bivens* claim that Dr. Gilley's publication of defamatory information through both a letter and a telephone call to his new employers deprived him of a constitutionally protected liberty interest. The other four counts in plaintiff's complaint merely state common law claims which are only appropriate for adjudication in this court if they are pendent to a surviving federal claim. *See generally United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) ("Certainly if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.").

Defendant contends that "the facts set out in plaintiff's complaint establish an allegation of only the common law tort of defamation, and do not properly allege a violation of his constitutional rights pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)." Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss or for Summary Judgment (hereinafter "Defendant's Brief") at 4. Defendant also contends that even if plaintiff has properly alleged a constitutional *Bivens* action, Dr. Gilley is clothed with qualified immunity which shields him from liability unless his conduct violated the standards laid down in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Closely related threshold inquiries are involved in determining whether plaintiff has made out an acceptable *Bivens* claim and whether defendant's qualified immunity requires dismissal of that claim. On the facts presented in this case, if plaintiff satisfies the *Harlow* standard he will necessarily make out a colorable *Bivens* claim. I therefore turn directly to the issue of qualified immunity.

Justice Powell, writing for the majority in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), set forth the standard for qualified immunity when he stated:

> . . . government officials performing discretionary functions generally are shielded from liability for civil

> damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. 102 S.Ct. at 2738. Hence, when faced with either a motion to dismiss or a motion for summary judgment which rests upon a claim of qualified immunity, I must:

> determine not only the currently applicable law, but whether the law was clearly established at the time the action occurred. *Harlow v. Fitzgerald*, 102 S.Ct. at 2738 (footnote omitted). If the law was not clearly established, the defendant will prevail on summary judgment on the basis of the qualified immunity defense, *id.* [457 U.S.] at 821 [102 S.Ct. at 2739-2740] (Brennan, J. concurring). If, on the other hand, the applicable law was clearly established, then, as the Court noted in *Harlow*, it should have been known to "a reasonably competent public official," and the qualified immunity defense "should ordinarily fail" unless the defendant "claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard."

Czurlanis v. Albanese, 721 F.2d 98, 108 (3d Cir.1983) (quoting *Harlow*).[3] As the Supreme Court recently asserted, "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action," *Anderson v. Creighon*, ___U.S.___, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987) (quoting *Harlow*), "assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.*

The Supreme Court also has provided recent guidance in applying the *Harlow* standard to specific facts and legal rules. The Court instructs:

> The operation of [the *Harlow*] standard, however, depends substantially upon the level of generality at

[3] As defendant points out, "until this threshold immunity question is resolved, discovery should not be allowed." *Harlow v. Fitzgerald*, 457 U.S. 800, 817, 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396 (1982).

> which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow* ... The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Anderson v. Creighton, ___U.S.___, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 523 (1987); *see also Martin v. Malhoyt*, 830 F.2d 237, 253 (D.C.Cir.1987). The Court of Appeals for the District of Columbia has provided the further guidance that:

> Consistent with the *Anderson v. Creighton* Court's emphasis on the "particularized" manner in which the immunity inquiry is to be undertaken, "we subject damage actions against government officials to a heightened pleading standard," *Smith v. Nixon*, 807 F.2d 197, 200 (D.C. Cir.1986), wherein plaintiffs must, at the very least, specify the "clearly established" rights they allege to have been violated with "sufficient[ ] precis[ion] to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds." *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir.1984).

Martin, supra, 830 F.2d at 253 (D.C. Cir. 1987); *see also Ellsberg v. Mitchell*, 807 F.2d 204 (D.C.Cir.1986); *Halperin v. Kissinger*, 807 F.2d 180 (D.C.Cir.1986).

However, despite the Supreme Court's instruction that lower courts focus on the contours of the right as applied to the specific facts in a given case, and the Circuit Court's requirement that a

heightened pleading standard be applied in the context of a qualified immunity inquiry, the Supreme Court has also emphasized that "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Anderson v. Creighton*, 107 S.Ct. at 3039; *Mitchell v. Forsyth*, 472 U.S. 511, 535, n. 12, 105 S.Ct. 2806, 2820, n. 12, 86 L.Ed.2d 411(1985). Finally, when scrutinizing a claim against the *Harlow* standard, it must be kept in mind that when government officials violate the law, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow, supra*, 457 U.S. at 814, 102 S.Ct. at 2736.

[1, 2] In this case, the threshold immunity question is whether it was clearly established in late 1985 that plaintiff had a liberty interest of which defendant deprived him. Stated in more specific terms, I must determine whether Dr. Siegert's loss of employment at the Bremerhaven hospital and his inability to obtain his credentials as a result of the allegedly defamatory communications made by defendant involves the violation of a concrete, specific "liberty interest" within the protection of the due process clause of the Fifth Amendment.[4] A careful review of the case law leaves little question that plaintiff's clearly established constitutional rights were violated by defendant's conduct. Defendant's contentions to the contrary are based both on a refusal to accept as true the facts alleged by plaintiff,[5] and an inappropriately narrow

[4] The same standard for determining deprivations of liberty without due process of law applies under the Fifth and the Fourteenth Amendments. *See Paul v. Davis*, 424 U.S. 693, 702, n. 3, 96 S.Ct. 1155, 1161, n. 3, 47 L.Ed.2d 405 ("If ... defamation by a state official is actionable under the Fourteenth Amendment, it would of course follow that defamation by a federal official should likewise be actionable under the cognate Due Process Clause of the Fifth Amendment."); *see also Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1105, n. 13 (1985).

[5] For instance, defendant asserts that "plaintiff's constitutional tort action must be dismissed because plaintiff cannot possibly establish that at the time Dr. Gilley wrote the letter the law was clearly established that writing a letter about a former employee to his prospective employer which is allegedly defamatory in response to the former employee's request that his new employer be provided with all information about the employee's job performance subjects the former employee to a deprivation of his liberty without due process of law." *See* Defendant's Supplemental Memorandum at 5. Defendant's sharply slanted characterization of the facts and distortion of the nature of the constitutional right at issue in his case is useless for purposes of considering plaintiff's motion to dismiss. Although plaintiff must meet a heightened pleading standard, he still retains the discretion to choose the constitutional right which he contends has been violated.

understanding of the breadth of plaintiff's constitutional liberty interests as recognized by the D.C. Circuit in 1985.

Defendant contends that this case is controlled by *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) and *Mosrie v. Barry*, 718 F.2d 1151 (D.C.Cir.1983).[6] The facts in this case, however, are readily distinguishable from the facts in those cases. The events set forth by plaintiff in this case are much more similar to the underlying facts in *Doe v. United States Dept. of Justice*, 753 F.2d 1092 (D.C. Cir. 1985) (finding violation of constitutionally protected liberty interests of attorney discharged by Department of Justice amidst charges of dishonesty) and *Bartel v. F.A.A.*, 725 F.2d 1403 (D.C. Cir.1985) *on remand* 617 F.Supp. 190 (D.D.C.1985).

In *Paul v. Davis*, plaintiff was arrested for shoplifting and local police chiefs posted him as an "active shoplifter" in a flyer circulated to hundreds of merchants. After the charges against him were dropped, plaintiff sued the police for violation of his constitutional rights under 42 U.S.C. § 1983. The plaintiff in *Paul* was neither a government employee nor an applicant for a government job. His sole claim for relief was for harm to his reputation. The Supreme Court characterized the question presented in *Paul* as "whether respondent's charge that petitioner's defamation of him, standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U.S.C. § 1983

[6] Defendant, for instance, asserts that: "The decisions in *Paul v. Davis, supra* and the cases that follow it are clearly dispositive of plaintiff's attempt to allege a constitutional violation in the present case. Acts by government officials which are claimed to harm a person's reputation and his future earning capacity do not constitute a violation of any right protected by the Constitution." Defendant's Brief at 6. Of course, as discussed above, plaintiff has alleged significantly more than merely harm to reputation and resultant harm to future earning capacity. He has set forth specific government jobs which he has lost and he has alleged the foreclosure of the opportunity to obtain government positions in his profession in the future.

and the Fourteenth Amendment." 424 U.S. at 694, 96 S.Ct. at 1157. The Court concluded that it did not and held that defamation alone is not enough to give rise to a due process right; "other governmental action" is required.[7] The Court, well aware of the "frequently drastic effect of the 'stigma' which may result from defamation by the government," *id.* 424 U.S. at 701, 96 S.Ct. at 1160-1161, held that proof of damages does not meet that requirement.

Rather, the *Paul* Court required some tangible alteration of "status" in addition to an injury in reputation to make out a cognizable liberty interest. This requirement has become popularly known as the "reputation plus" standard. See *Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1107 (D.C.Cir.1985). Whereas the plaintiff in *Paul* failed to allege any harm to specific employment opportunities, Dr. Siegert has alleged both the loss of a specific position (Bremerhaven) and the denial of another specific opportunity for governmental employment (Stuttgart). Dr. Siegert, moreover, has alleged a permanent change in status due to his inability to obtain credentials to work with children. Because of that change in status, he "was wrongfully denied the right to be considered for government [employment] in common with all other persons." *Mosrie*, 718 F.2d at 1161. Plaintiff, a career psychologist, who is presently working as a librarian, has alleged that he may never be able to obtain another government position as a psychologist and that his ability to practice his profession has been destroyed. Accepting these allegations as true, defendant's actions have undoubtedly imposed a "stigma" on Dr. Siegert that has foreclosed his freedom to take advantage of other employment opportunities. See *Board of Regent v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972). Unlike the plaintiff in *Paul*, Dr. Siegert has alleged much more than "mere" harm to reputation. *Paul* is therefore inapposite.

[7] Similarly, Judge Bork pointed out in *Mosrie v. Barry*, 718 F.2d 1151, 1158 (D.C.Cir.1983) that, "Indeed, in explaining that harm to reputation is not a deprivation of liberty, the Court [in *Paul v. Davis*] quoted Justice Reed from *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951): the defamation may be 'hurtful to [the plaintiffs'] prestige, reputation and *earning power*' but nonetheless does not deprive them of a fifth amendment liberty interest."

Defendant's reliance on *Mosrie v. Barr*, 718 F.2d 1151 (D.C.Cir.1983) and *Shewmaker v. Minchew*, 504 F.Supp. 156 (D.D.C. 1980), *aff'd* 666 F.2d 616 (D.C.Cir.1981) is similarly misplaced. In *Mosrie*, the D.C. Circuit narrowly held that an individual cannot claim a violation of his or her constitutional rights when he or she is merely laterally transferred:

> The harms suffered by appellant in this case do not meet the *Paul v. Davis* requirement of loss of a government position or change in legal status. Appellant was merely transferred laterally . . . To find the lateral transfer a deprivation would be inconsistent with *Paul v. Davis's* repeated emphasis on "loss of government employment."

Mosrie, 718 F.2d at 1161. Because the *Mosrie* plaintiff's "management responsibilities, duties and promotional potential after his transfer [were] comparable to those before" the transfer, *Mosrie* is easily distinguishable from this case. Similarly, in *Shewmaker*, the plaintiff was first demoted, but was subsequently reinstated, by a successful administrative challenge, to his original position. Dr. Siegert, obviously, has not been reinstated. Both *Mosrie* and *Shewmaker* involved situations where the government injured the plaintiff's reputation, but in so doing, failed to effect "a removal, extinguishment, or significant alteration of an interest recognized and protected by ... law." *Mosrie*, 718 F.2d at 1160-61. Unlike Dr. Siegert, neither the plaintiff in *Mosrie* nor the plaintiff in *Shewmaker* lost their job. Moreover, neither lost what amounts to their right to continue practicing their profession.

Although *Paul* and *Mosrie* do not control the outcome of this case, those cases make it clear that in order for plaintiff to establish that the government has deprived him of a constitutionally protected liberty interest, he must "demonstrate that the government's defamation resulted in a harm to some interest beyond reputation." *Doe v. United States Dept. of Justice*, 758 F.2d 1092, 1111 (D.C.Cir.1985). According to the D.C. Circuit's decisions in *Doe* and *F.A.A. v. Bartel*, 725 F.2d 1403 (D.C.Cir.1984), both of which were decided prior to the occurrence of the events at issue in this case, "[l]oss of present or future

employment, however, satisfies that required additional interest." *Doe*, 758 F.2d at 1111. In this case, Dr. Siegert meets that requirement because he lost both his present job (Bremerhaven) and a specific future job (Stuttgart) because of defendant's defamation.

Doe involved an action brought by a former Department of Justice (DOJ) attorney against the Department and various DOJ officials. The plaintiff was discharged from her position as a DOJ attorney amidst charges of unprofessional conduct and dishonesty. After unsuccessfully seeking an administrative name-clearing hearing, the plaintiff sued in federal court, seeking reinstatement, back pay and other appropriate relief from the Department; she sought money damages from the individual defendants. *Doe*, 753 F.2d at 1095. Although the D.C. Circuit affirmed the dismissal of plaintiff's *Bivens* action against the individual DOJ defendants on statute of limitations grounds, *Id.* 753 F.2d at 1114-15, the court found that she had asserted a constitutionally protected liberty interest against the Department. *Doe*, 753 F.2d 1102-1114. Government action had both caused plaintiff to lose her job and placed a "stigma" on her. The court found her liberty interests had therefore been violated.

In reaching that conclusion, the D.C. Circuit articulated a number of principles which bear directly on whether or not Dr. Siegert has set forth a constitutionally protected liberty interest. First of all, the *Doe* court found that government defamation accompanied by the loss of government employment would support a liberty interest claim. The court stated:

> *Paul* explicitly recognized that the *combination* of government defamation plus the failure to rehire or the discharge of a government employee states a liberty interest claim even if the discharge itself deprives the employee of no property interest protected by the fifth or fourteenth amendments . . . "it is the individual's status as a government employee and not his property interest in continued employment which furnishes the 'plus' that raises reputation to the level of a constitutionally protected liberty interest."

Doe, 753 F.2d at 1106-07 (citations omitted) (emphasis added). In addition, the *Doe* court went to great lengths to make it clear that Doe, who like the plaintiff in *Roth* was not a "protected" government employee, need not enjoy "protected status" in continued government employment in order to state a liberty interest claim. Rather, the court emphasized that, "a discharge from government employment satisfies *Paul*'s 'reputation plus' requirement *regardless* of whether the employee can point to any independent property interest in continued employment." *Doe*, 753 F.2d at 1109 (emphasis added).

[3, 4] Therefore, a common law defamation is transformed into a constitutional deprivation of liberty when the government is the source of the defamatory allegations and the resulting "stigma" involves "some tangible change of status vis-a-vis the government." *Doe*, 753 F.2d at 1108-09. Under *Doe*, the fact that Dr. Siegert may have possessed no *Roth* property interest in either his original position at St. E's or in his positions in Germany does not interfere with his invocation of a liberty interest when government defamation causes his loss of employment and a change in his legal status.

A little less than two years before the events in this case occurred, the D.C. Circuit, in *Bartel v. F.A.A.*, 725 F.2d 140 (D.C.Cir.1984), addressed a factual situation which closely parallels the facts in this case and which foreshadowed the principles enunciated in *Doe*. In that case, Bartel, an air safety inspector for the Eastern Region of the FAA, was accused of certain Privacy Act violations. After an investigation, Brian Vincent, the Chief of the FAA Eastern Region Flight Standards Division, decided that a letter of reprimand to Bartel was appropriate. No such letter was ever issued, however, because Bartel left the FAA for employment elsewhere before the adverse action became official. Slightly less than a year after his departure, Bartel applied for a job with the Southern Region of the FAA. When Vincent learned that Bartel was seeking a position with the Southern Region, he wrote an allegedly defamatory letter about Bartel and the Privacy Act accusations to several FAA inspectors. These letters came to the attention of the hiring officials considering Bartel's candidacy. Although he was determined to be "a best qualified candidate," Bartel was not

selected for the position at the FAA. Bartel was later hired by the FAA for a temporary GS-12 position, despite the fact that he was qualified for a permanent GS-13 position that was open at the same time.

Bartel sued Vincent in his personal capacity, alleging that "Vincent's actions defamed him and resulted in the denial of his right to consideration for reemployment at the GS-13 position on an equal basis with others of equivalent skill and experience." *See Bartel*, 725 F.2d at 1415, 617 F.Supp. at 195. The D.C. Circuit found that Bartel "was wrongfully denied the 'right to be considered for government [employment] in common with all other persons."' *Bartel*, 725 F.2d at 1415 (quoting *Mosrie*, 718 F.2d at 1161). According to the D.C. Circuit, "the refusal of the FAA, Southern Division to hire Bartel for the same reasons despite his 'best qualified' rating may itself have effectively extinguished a legally recognized and protected interest." *Bartel*, 725 F.2d at 1415. On remand, the district court held that Bartel had "identified a cognizable liberty interest the denial of which would constitute a due process violation." *Bartel*, 617 F.Supp. at 195. It further held that, "[l]oss of future or present government employment satisfies" the requirement under *Paul* that the plaintiff "demonstrate that the government's defamation resulted in a harm to some interest beyond reputation." *Id.* 617 F.Supp. at 195 (citing *Paul*, *Mosrie* and *Doe*).

The facts in this case are remarkably similar to the facts in Bartel. Both cases involve an allegation by a former government employee that government defamation caused the foreclosure of an opportunity to obtain a specific future government position. Neither case involves a discharge or termination from the former government employee's position— both involve "voluntary" departure to avoid the threat of punitive action. There can be little question that if Bartel possessed a liberty interest in seeking the government position at the FAA, then Dr. Siegert possessed a liberty interest in his job at the hospital in Bremerhaven. In fact, Dr. Siegert, if anything, was deprived of substantially "more" of his liberty interest than was Bartel—Dr. Siegert lost not one, but two positions (Bremerhaven and Stuttgart) for which he had already been hired. Moreover, he lost his credentials and he has not been able to obtain another position.

[5] The case law prevailing at the time of the events in question, therefore, plainly provides that defendant's actions violated Dr. Siegert's constitutionally protected liberty interests. Despite the clarity of that case law, defendant urges two separate, but related, narrow constructions of the case law. Both must be rejected as being inconsistent with the holdings in *Doe* and *Bartel*. Defendant asserts that:

> ... a defamation by a government official does not constitute the violation of a liberty interest, protected by the due process clause, unless the person defamed can establish that the defamation accompanied a "loss of government position or a change in legal status." (*Mosrie*). Therefore, to prevail a plaintiff must establish that the defamation was uttered incident to his discharge or incident to an alteration of his legal status, resulting in his loss of some entitlement protected from governmental deprivation by state or federal law.

Relying on that passage, defendant contends that because defendant did not defame Dr. Siegert "incident to his discharge" or to a change in his legal status, there was no violation of plaintiff's liberty interest. In other words, because defendant's defamation of plaintiff allegedly did not occur in conjunction with his discharge/resignation from St. E's, but rather occurred incident to his loss of employment in Germany, plaintiff's liberty interests were not violated.[8] Under this theory, presumably, no matter what defendant said or wrote about plaintiff *after* he had either left his original job or been discharged, plaintiff would not have recourse to a *Bivens* action. Of course, this reasoning wholly ignores the plain reality that defendant's alleged defamation of Dr. Siegert *caused* his discharge from Bremerhaven and foreclosed his employment opportunity in Stuttgart and most likely elsewhere.

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[8] Defendant's description of the factual scenario also glosses over the fact that Dr. Gilley sent the allegedly defamatory letter only 23 days after Dr. Siegert resigned from his position at St. E's under the threat of removal.

Furthermore, this excessively narrow restatement of the dictum excerpted from *Mosrie* finds no support in the case law. Defendant's view of the law runs directly counter to the D.C. Circuit's square holding in *Bartel* that an individual may have a liberty interest in future government employment. *See supra*. Furthermore, as the D.C. Circuit stated in *Doe*, "*an overwhelming majority* of the circuits have explicitly concluded that a non-tenured, at will government employee states a liberty interest claim after *Paul* when discharged *or foreclosed from future government employment amidst stigmatizing allegations by the government.*" *Doe*, 753 F.2d at 1110, n. 18 (collecting cases) (emphasis added). *See also Conset Corp. v. Community Services Administration*, 655 F.2d 1291 (D.C.Cir.1981) (due process guarantees apply to memorandum calling into question integrity, honesty or business reputation where it effectively denies contractor all *future* government contract work). Either discharge or foreclosure of a future opportunity satisfies the *Paul* requirement for more than mere defamation. All that is necessary is "harm to reputation plus"— the order in which they occur is irrelevant. The two events merely must be closely connected.

Dr. Gilley's letter satisfies this "connectedness" standard. The letter not only was sent incident to his discharge, but *caused* plaintiff's loss of two job in Germany and the alteration of his legal status in the form of his loss of his credentials. There can be no doubt that the defamation by defendant accompanied "a loss of government position or change in legal status." *Mosrie*, 718 F.2d at 1161-62. There is nothing in the case law to support defendant's implied contention that plaintiff's loss of his government position or the alteration in legal status must *precede* the defamation.[9] Such a reading of the cases would simply stand *Paul* and its progeny on their head.

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[9] Defendant relies on the following passage from *Mosrie*:

> For a defamation to give rise to a right to procedural due process, it is necessary—we need not say when it is sufficient—that the defamation be accompanied by a discharge from government employment or at least a demotion in rank and pay.

Mosrie, 718 F.2d at 1162. Nothing in that passage implies that the defamation must be preceded by the discharge or demotion.

[6] Defendant further contends that for plaintiff to have a constitutionally protected liberty interest, the same government officials that defame him must also deny him a legal right. Because defendant in this case claims he has not done anything to directly harm the plaintiff beyond sending the allegedly defamatory letter, he argues he has not caused the plaintiff the deprivation of a liberty interest. Defendant relies on the following dictum from *Mosrie* to support his argument:

> The reaction of others to unfavorable publicity about a person is not, within the meaning of *Paul v. Davis*, a change in legal status imposed by the government ... Financial loss and loss of some employment opportunities do not, therefore, amount to an alteration of a legal right. That must be so even if some of the job opportunities lost are for public jobs .. .

Mosrie, 718 F.2d at 1162. In short, defendant contends that there is no *Bivens* action in this case because, neither "the defendant [n]or St. Elizabeths Hospital has taken an action, in addition to the defamatory letter, to bar the plaintiff's ability to seek employment." Defendant's Reply at 8.

Defendant misreads the language in *Mosrie*. What *Mosrie* and *Paul* preclude from the zone of constitutionally protected liberty interests is mere defamation without an attendant loss of a specific government job or an alteration in legal status. What is at issue in this case is not merely "the reaction of others to unfavorable publicity." *Mosrie*, 718 F.2d at 1162. Rather, defendant, a government official, allegedly took deliberate action, (after plaintiff resigned from St. E's), to bar the plaintiff from obtaining the position he was seeking in Germany. Granted, the reaction of third parties to defendant's allegedly defamatory letter was a necessary step in Dr. Siegert's ultimate denial of the positions in Germany. The fact that Dr. Gilley had to work through others to accomplish his goals, however, does not relieve Dr. Gilley from full responsibility for the natural and expected outcome of his actions. From Dr. Siegert's perspective, it is obviously irrelevant that third parties participated in the process whereby he lost his new position. What matters to him is that Dr. Gilley allegedly defamed him, and as a

direct and proximate result of that defamation, he lost his job and his professional standing. In addition, he has been unable to obtain another position in his profession.

When the *Harlow* Court redefined the qualified immunity defense it provided an additional basis for defendant to retain his qualified immunity *even if* his actions violated clearly established statutory or constitutional rights. According to the Court:

> If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

Harlow, 457 U.S. at 818-819, 102 S.Ct. at 2738-2739. *See also Anderson v. Creighton*, 107 S.Ct. 3034, 3038 (1987) (qualified immunity shields government officials "from civil damages liability as long as their actions could reasonably be thought consistent with the rights they are alleged to have violated"); *Davis v. Scherer*, 468 U.S. 183, 191, 104 S.Ct. 3012, 3017, 82 L.Ed. 2d 139 ("Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard.").

In this case, the defendant does not argue that any exceptional circumstances exist to demonstrate that he reasonably neither knew nor should have known that his actions were violating plaintiff's constitutionally protected right to liberty. Indeed, his alleged actions may constitute the uttering of a false statement in contravention of 18 U.S.C. § 1001.[10] His qualified immunity

[10] 18 U.S.C. § 1001 provides:

> Whoever in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

defense therefore fails and my inquiry is completed by my determination that the applicable law was well established. *See Hobson v. Wilson*, 737 F.2d 1, 27 (D.C.Cir. 1984).

Our inquiry does not end with the identification of a violation of a clearly established constitutional right and the stripping away of defendant's qualified immunity. Deprivation of a liberty interest is cognizable as a violation of the Fifth Amendment only when it is done without due process of law. Here, of course, Dr. Gilley's actions against Dr. Siegert were taken without any process whatsoever. There can be no question that if his allegations are true, plaintiff has been denied due process of law.

[7] Defendant contends, however, that plaintiff "has received *or will receive* all the process that is due him" (emphasis added). He argues that the remedies available to plaintiff under the administrative scheme established by the Civil Service Reform Act of 1978, "preempt a constitutional claim for damages predicated on conduct remediable under that scheme." Defendant's Brief at 10. *See also Bush v. Lucas*, 462 U.S. 367, 387, 103 S.Ct. 2404, 2416, 76 L.Ed.2d 648 (1983). Indeed, defendant identifies several administrative forums where plaintiff might proceed to have his various harms remedied.

It is, however, premature to consider defendant's arguments about the alternative remedies available to plaintiff. Before me are very serious allegations of a deprivation of constitutional rights without due process of law. I must accept these allegations as true for purposes of deciding this motion. In addition, the adverse consequences that befell plaintiff are serious. Dr. Siegert has identified four distinct, but related harms he has suffered as a result of Dr. Gilley's alleged actions: (1) he lost a position he had already obtained in the Bremerhaven hospital; (2) he was foreclosed from an opportunity to work at the hospital in Stuttgart; (3) he was refused credentials at both hospitals and fears being denied credentials elsewhere; concomitantly he has been unable to find "either remotely comparable employment here or abroad." Plaintiff's Op-

position to Reconsideration at 2, n. 2; and (4) his reputation in his professional community was harmed. In addition, of course, he has alleged emotional distress and loss of income because of his inability to obtain a position in his profession. Finally, plaintiff is deeply concerned that unless his record is corrected and measures taken to prevent a repetition of the actions taken against him in this case, these event will haunt him for the rest of his life.

Under these circumstances, I would be trivializing very valuable protections from which this plaintiff is entitled to benefit were I to force this plaintiff to seek relief in another forum. There is no requirement in the law for me to relegate this plaintiff to an administrative forum, if one actually exists, at this early stage of this litigation.

As a result, I find that for this plaintiff there is not available the "substantially adequate remedy through [a] comprehensive federal personnel scheme" which under *Bush* would preclude the implication of a *Bivens* remedy. *Bartel v. F.A.A.*, 617 F.Supp. 190 (D.D.C.1985); *Bush v. Lucas*, 462 U.S. 367, 387-390, 103 S.Ct. 2404, 2416-2418, 76 L.Ed.2d 648 (1983). The process which is due plaintiff must come from this court.

[8] In addition, since I am retaining jurisdiction over plaintiff's *Bivens* claim, it is appropriate for me to exercise pendent jurisdiction over plaintiff's state law claims. These state law claims state separate but parallel grounds for the relief sought in the *Bivens* claim. *See generally United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Many of the operative facts which give rise to Dr. Siegert's constitutional claim against Dr. Gilley are the same as those upon which Dr. Siegert's state law claims rest. Furthermore, the constitutional claim, as discussed above, is a serious one and is not a mere "appendage" to state law claims which comprise "the real body of the case." *Id.* 383 U.S. at 727, 86 S.Ct. at 1139. *See also Bartel v. F.A.A.*, 725 F.2d 1403, 1405, n. 2 (D.C.Cir.1984). Therefore, it is appropriate to hear this entire case in federal court.

In light of my holding regarding defendant's assertion of qualified immunity, I need not address defendant's motion for summary judgment on the basis of his alleged absolute immunity

from common law tort claims until after discovery is complete. Because the common law claims closely parallel plaintiff's *Bivens* claim, permitting the common law claims to go forward at least until the completion of discovery should not impose any additional burdens on defendant.

Although I have denied defendant's motion to dismiss and his motion for summary judgment and have rejected his qualified immunity defense, I must emphasize that I have reached no conclusions as to the merits of this case. This Opinion has been based on well pleaded allegations which, although they were subjected to heightened scrutiny, were accepted as true. These allegations may well prove to be unsubstantiated and this case may well fail. I reluctantly wrote this Opinion because of counsel for the defendant's insistence that I had no right to establish a limited discovery schedule prior to issuing an opinion on the qualified immunity defense.

Obviously, in a case of this sort, knowing the facts is essential to determining the merits. If the information supplied by defendant is true, and the plaintiff is plainly incompetent and derelict, the plaintiff must bear the cross. Furthermore, the defendant must be protected in providing such information if he acted in good faith. To foster the objective of a free exchange of truthful information, however, an individual need not be permitted to intentionally or maliciously provide false information. This defendant should not be permitted to hide behind the laudable public policy of promoting candor in job references. In addition to candor, both the subject and the recipient of information about a potential employee deserve accuracy and truthfulness. Those important values need not be sacrificed to maximize the quantity of information exchanged.

For the foregoing reasons, and upon consideration of the entire record herein, defendant's motion for reconsideration is hereby DENIED and it is

ORDERED that in light of this Opinion, the parties shall proceed to conduct discovery.

Civ. Action No. 86-3234

United States District Court

FOR THE DISTRICT OF COLUMBIA

Filed Dec. 3, 1987

FREDERICK A. SIEGERT,

Plaintiff,

v.

H. MELVYN GILLEY,

Defendant.

Judge Stanley Sporkin

ORDER

This case involves a claim by a clinical psychologist who was formerly employed at Saint Elizabeths Hospital and is now working in Germany. Plaintiff claims that defendant has deprived him of his due process rights and he has brought this action pursuant to the Fifth Amendment of the Constitution and the *Bivens* doctrine. He has also invoked the pendent jurisdiction of this court for his claims of defamation, intentional infliction of emotional distress and for interference with contractual relations.

The gravamen of plaintiff's complaint is that defendant's actions caused him to lose his opportunity to be credentialed as a clinical psychologist in Germany and also caused him to suffer a drastic reduction in his professional responsibilities. Plaintiff claims that defendant interfered with his employment as a clinical psychologist with the Army Medical Department in Bremerhaven, Germany. Plaintiff specifically asserts that defendant contacted, by telephone and by letter, Colonel William Smith, Jr., the Deputy Commander for Clinical Services in Bremerhaven and the Chairperson of the Credentials Committee. Plaintiff contends that

defendant's contacts with Colonel Smith were defamatory and led to his failure to be credentialed and the ensuing reduction in his professional responsibilities.

Defendant has moved for Summary Judgment and I have received briefs from both parties and heard argument on that motion. I have also recently received a copy (filed under seal) of a letter about the plaintiff sent by the defendant to Colonel Smith.

After careful review of the written materials and the argument, I am not prepared to decide this matter on a Summary Judgment motion at this time. I would like to see a more developed record. While I agree with defendant that matters of this kind should be disposed of summarily whenever possible, a limited amount of discovery in this case is warranted.

I particularly believe it would be appropriate to take the testimony of the two principal actors in this affair – plaintiff, Dr. Siegert, and defendant, Dr. Gilley. I also believe it would be useful to take the testimony of Colonel Smith. In addition, I see no reason why any correspondence between defendant and Colonel Smith should be withheld from plaintiff – including the October 23, 1985 letter filed under seal on November 23, 1987. That correspondence is undoubtedly relevant to this litigation. All such documents should be kept under seal but should be made available to plaintiff for discovery purposes.

It is therefore now hereby

ORDERED that plaintiff shall be permitted to take the deposition of defendant and Colonel Smith, and it is further

ORDERED that upon completion of those depositions, defendant shall be permitted to take the deposition of plaintiff, and it is further

ORDERED that upon completion of those depositions, I will again entertain all suitable motions.

Dated:

Stanley Sporkin
United States District Judge

CREDENTIAL INFORMATION REQUEST FORM

ST Elizabeths Hospital
Last place of Assignment
2700 Martin L King Ave
Address
Washington DC
City and State
20032
Zip Code

55a

Dear Sirs:

I am applying for previleges on the staff of the US-Army Hospital Bremerhaven, Federal Republic of Germany. To complete my application for credentials, I request you send the Deputy Commander for Clinical Services, all information on job performance and the privileges granted while I was a member of your staff. I further request that a copy of this information be provided to me for my personal records. This information should be sent as soon as possible, so the credential/privileges process can be expedited. Thanks for your cooperation.

Frederick A. Sargent PhD
Name
GS 12
Rank
Clinical Psychologist
Job Title
Bremerhaven USAMEDDAC
MTF

Present employer's address:
LTC William R. Smith Jr. MD
Deputy Commander for Clinical Services
USAMEDDAC Bremerhaven
APO NY 09069

Frederick A. Sargent
Signature